TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 65

WEYERHAEUSER STEAMSHIP COMPANY,
PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 19, 1962
CERTIORARI GRANTED MARCH 5, 1962

No. 17187

United States Court of Appeals

for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

WEYERHAEUSER STEAMSHIP COMPANY AND ST. PAUL FIRE & MARINE INSURANCE CO., AND FIREMAN'S FUND INSURANCE CO.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Northern District of California, Southern Division

In Admiralty

No. 27359

WEYERHAEUSER STEAMSHIP COMPANY, a corporation,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

LIBEL IN PERSONAM

To the Honorable Judges of the United States District Court Northern District of California, Southern Division:

The libel of Weyerhaeuser Steamship Company, a corporation, as owner of the F. E. WEYERHAEUSER, a steamship of United States registry against the United States of America, respondent in a cause of collision, civil and maritime, alleges as follows:

I.

That at all pertinent times, libelant was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, having an office and place of business in San Francisco, California.

II.

That at all pertinent times, the respondent, the United States of America was and still is a sovereign which has by law consented to be sued herein.

III.

That at all pertinent times the libelant was the owner and operator of the steamship, F. E. WEYERHAEUSER, an inspected liberty type cargo vessel of United States Registry Official No. 245564, gross tonnage, 7218.

IV.

Upon information and belief that at all pertinent times, the respondent, United States of America, was and still is the owner and operator of the Dredge PACIFIC, an inspected hopper type dredge, not documented, built in 1937 of steel, 837 gross tons.

V.

This is a suit brought under the Act of March 3, 1925 known as the Public Vessel Act, 46 U. S. C. A. Section 781-790. The libelant hereby elects to have his cause proceed in accordance with the principles of libels in rem and desires also to seek relief in personam.

VI.

Upon information and belief that the Dredge PACIFIC at all times hereinafter mentioned was and now is operated as a public vessel of the United States and now is or during the pendency of this action will be within the navigable waters in the jurisdiction of this court.

VII.

Upon information and belief that heretofore, to wit, at about the hour of 1730 on the 8th day of September, 1955, respondent, Dredge PACIFIC ran into and collided with libelant's F. E. WEYERHAEUSER.

Said collision occurred just outside and slightly south of the mouth of Coos Bay at the approximate position of Latitude 43° 21'N and Longitude 124° 24'W, Pacific International Waters. At the time of the collision the weather was very foggy, visibility poor, with a smooth sea and variable breezes. The F. E. WEYERHAEUSER was equipped with radar, direction finder, gyro compass with five repeaters, a steam whistle, all other equipment required to render her seaworthy and all said equipment was in good repair and operating condition.

VIII.

Upon information and belief that at the time of said collision the F. E. WEYERHAEUSER was bound from Coos Bay to Los Angeles carrying a cargo of lumber. At approximately 1707 on the 8th day of September, 1955 the F. E. WEYERHAEUSER disembarked its pilot and rounded the sea buoy (BW "K") at a course of 226° True than changed its course at 1717 to 215° True which course was continued until the collision at approximately 1730. That at or about 1712 the crew of the F. E. WEYERHAEUSER picked up by radar a target which later was ascertained to be the Dredge PACIFIC. The said Dredge PACIFIC was approximately dead ahead when first sighted and approximately 11° to the starboard of the F. E. WEYERHAEUSER's bow after the course change to 215° at 1717. The distance was between two and three miles. Between 1717 and the time of the collision, 1730, the F. E. WEYERHAEUSER maintained a constant course of 215°, while the Dredge PACIFIC was groping about and changed its course several times to

its starboard in an attempt to cut across the bow of the F. E. WEYERHAEUSER on a wholly unpredictable course and finally collided with the F. E. WEYERHAEUSER at approximately a 45° angle in contacting the F. E. WEYERHAEUSER abreast the No. 4 hold on the starboard side. By negligently handling and mismanaging the Dredge PACIFIC at excessive speeds the crew of said Dredge PACIFIC caused it to collide with the F. E. WEYERHAEUSER thereby damaging the F. E. WEYERHAEUSER; that the aforesaid damage was caused wholly by and do solely to the fault and negligence on the part of those in charge of the Dredge PACIFIC, in the following particulars, among others, which will be brought out upon trial:

(1) That the captain and crew of the Dredge PACIFIC handled the Dredge PACIFIC negligently and carelessly in attempting to turn a clear starboard to starboard passing situation into a crossing situation;

(2) That the Dredge PACIFIC was moving at excessive speed under the circumstances and weather conditions;

(3) That the captain and crew of the Dredge PACIFIC failed to use good seamanship;

(4) That the captain and crew of the Dredge PACIFIC were groping about on an unpredictable course and negligently attempted to cut across the bow of the F. E. WEYERHAEUSER;

(5) That the captain and crew of the Dredge PACIFIC failed to take steps to avoid collision between the Dredge PACIFIC and the F. E. WEYERHAEUSER.

IX.

That as a result of the negligence and carelessness of the respondent, as hereinabove set forth, libelant has been and now is damaged in the amount of $58,403.95, no part of which sum has been paid, although payment thereof has been duly demanded.

X

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that the respondent, United States of America, be required to appear and answer all and singular the matters aforesaid, and that the libelant may have a decree for the amount of its damages with interest and costs and that the libelant may have such other and further relief as may be just.

/s/ GRAHAM, JAMES & ROLPH

/s/ HENRY R. ROLPH

Proctors for Libelant

[Endorsed]: Filed July 18, 1956.

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED TO THE RESPONDENT, WHICH HE IS REQUIRED TO ANSWER IN WRITING

Comes now libelant, Weyerhaeuser Steamship Company, propounds the following interrogatories which it requires respondent, the United States of America, to answer in writing, as provided in Rule 31 of the Admiralty Rules of Practice for the Courts of the United States:

1. Please state the names and addresses of all persons on the bridge of the Dredge PACIFIC between 1700 and the time of collision of the Dredge PACIFIC with the F. E. WEYERHAEUSER at approximately 1730 hours on September 8, 1955.

2. Please state the names and addresses of any or all persons who served as lookout on the Dredge PACIFIC between 1700 and the time of the collision of the Dredge PACIFIC with the F. E. WEYERHAEUSER at approximately 1730 hours on September 8, 1955.

3. Is the respondent informed of the course, course changes, speed and speed changes of the Dredge PACIFIC between 1700 and 1730 hours September 8, 1955?

4. If the answer to the third interrogatory herein is in the affirmative, please state what you are informed were the course, course changes, speed and speed changes of the Dredge PACIFIC between 1700 and 1730 hours September 8, 1955.

5. State the source of the information supplied in answer to the fourth interrogatory and give the names and addresses of all persons supplying such information.

6. Was the Dredge PACIFIC equipped with a course recorder at the time of the collision?

7. Was the course recorder in operation during the thirty minutes prior to the collision?

8. If the answer to the seventh interrogatory is in the affirmative, please state whether or not you will produce the course recorder chart in question for inspection and copying without requiring a court order to produce same.

9. Please state whether you will produce the deck log and bell book of the Dredge PACIFIC for September 8, 1955 for inspection and copying without a court order.

10. If your answers to interrogatories 8 and 9 are in the affirmative, state where and when such will be produced.

11. Was the Dredge PACIFIC equipped with a gyro compass at the time of said collision?

12. Was the gyro compass in operation during the thirty minutes prior to the collision?

13. Was the Dredge PACIFIC equipped with radar at the time of said collison?

14. If the answer to interrogatory 13 is in the affirmative, state the type, model and year of the radar equipment on the Dredge PACIFIC.

15. Was the radar in operation during the thirty minutes prior to the collision?

16. If the answer to the 15th interrogatory is in the affirmative, give the names and addresses of the persons in charge of and observing the radar of the Dredge PACIFIC during the thirty minutes preceding the collision.

17. If the answer to the 15th interrogatory is in the affirmative, is the respondent informed as to the time when the F. E. WEYERHAEUSER was first detected on the radar of the Dredge PACIFIC?

18. If the answer to the 17th interrogatory herein is in the affirmative, please state what time your information indicates that the F. E. WEYERHAEUSER was first detected on the radar of the Dredge PACIFIC, if detected.

19. Is the respondent informed as to the bearing of the F. E. WEYERHAEUSER at the time the Dredge PACIFIC first detected it on radar?

20. If the answer to the 19th interrogatory is in the affirmative, according to your information, please state the bearing of the F. E. WEYERHAEUSER at the time it was first detected by the radar of the Dredge PACIFIC.

21. If the Dredge PACIFIC was equipped with radar and said equipment was operating, is the respondent informed of the approximate distance from the Dredge PACIFIC of the F. E. WEYERHAEUSER at the time it was first detected by the Dredge PACIFIC radar.

22. If the answer to the 21st interrogatory herein is in the affirmative, please state what you are informed was the distance from the Dredge PACIFIC to the F. E. WEYERHAEUSER at the time it was first detected by the Dredge PACIFIC radar.

23. Is the respondent informed of the signals or other communication exchanged by the Dredge PACIFIC and the F. E. WEYERHAEUSER from the time the Dredge PACIFIC detected the F. E. WEYERHAEUSER on radar until the time of the collision?

24. Is respondent informed whether any change or changes were observed by the crew of the Dredge PACIFIC in the course or speed of the F. E. WEYERHAEUSER between the time she was first detected on radar, if detected, until the time of the collision?

25. If the answer to the 24th interrogatory is in the affirmative, please state what you are informed were the changes observed in the course or speed of the F. E. WEYERHAEUSER between the time she was first detected on radar, if detected, until the time of the collision.

26. If the answer to the 23rd interrogatory is in the affirmative, please state what you are informed were the signals and communications which were exchanged between the Dredge PACIFIC and the F. E. WEYERHAEUSER from the time the F. E. WEYERHAEUSER was first detected by Dredge PACIFIC radar and the time of the collision.

27. Under the conditions prevailing at the time of the collision, what revolutions were being made by the engines of the Dredge PACIFIC (a) in response to

the signal for full speed ahead; (b) in response to half speed ahead; (c) in response to a signal for slow speed ahead?

28. What was the pitch of the propeller of the Dredge PACIFIC?

29. What, if any, error was there on the compass of the Dredge PACIFIC?

30. Is respondent informed of the reports received from the lookout on the Dredge PACIFIC on sighting the F. E. WEYERHAEUSER and on hearing the whistle signal sounded by it, if any, and how were said reports, if any, transmitted to the wheel house?

31. If the answer to the 30th interrogatory is in the affirmative, please state what you are informed were the reports received from the lookout on the Dredge PACIFIC on the sighting of the F. E. WEYERHAEUSER and on hearing the whistle signal sounded by it and as to how said reports, if any, were transmitted to the wheel house.

32. Is the respondent informed as to the distance required to bring the Dredge PACIFIC to a full stop when proceeding at the speed that it was proceeding at the time of the collision?

33. If the answer to the 32nd interrogatory is in the affirmative, what distance are you informed is required to bring the Dredge PACIFIC to a full stop when proceeding at the speed that it was proceeding at the time of the collision.

34. State with particularity the hours during which each of the persons referred to in interrogatories number 1 and number 2 performed duties during the 24 hours next preceding the collision.

35. Describe the weather conditions existing at the time of the impact of the Dredge PACIFIC with the F. E. WEYERHAEUSER: (a) wind, (b) sea, (c) visibility, (d) precipitation.

/s/ GRAHAM, JAMES & ROLPH

/s/ HENRY R. ROLPH,
Proctors for Libelant.

[Title of District Court and Cause.]

ANSWER

Comes Now respondent United States of America and for answer to the libel of the Weyerhaeuser Steamship Company as owner of the SS F. E. WEYERHAEUSER in a cause of collision, civil and maritime, admits, denies and alleges as follows:

I.

Answering unto Article I, respondent admits the allegations thereof.

II.

Answering unto Article II, respondent admits that it was and still is a sovereign nation; respondent alleges that the remaining allegations of said Article present questions of law for the determination of the court and require no answer.

III.

Answering unto Article III, respondent admits the allegations thereof.

IV.

Answering unto Article IV, respondent admits the allegations thereof.

V.

Answering unto Article V, respondent alleges that the allegations thereof are matters for the attention of the court and require no answer.

VI.

Answering unto Article VI, respondent admits the allegations thereof.

VII.

Answering unto Article VII, respondent admits that at about the hour of 1730 on the 8th day of September, 1955 a collision occurred between the Dredge PACIFIC and the SS F. E. WEYERHAEUSER, that at the time of the collision the weather was foggy, visibility poor, with a smooth sea and variable breezes, and that the F. E. WEYERHAEUSER was equipped with radar, direction finder, Gyro compass with five repeaters and steam whistle; respondent denies each and every, all and singular, the remaining allegations of said Article not herein otherwise admitted or denied.

VIII.

Answering unto Article VIII, respondent admits that at the time of said collision the F. E. WEYERHAEUSER was bound from Coos Bay to Los Angeles carrying a cargo of lumber and that at approximately 1730 on the 8th day of September, 1955, a collision occurred between the Dredge PACIFIC and the said F. E. WEYERHAEUSER. Respondent denies each and every, all and singular, the allegations of said Article not herein otherwise admitted or denied.

IX.

Answering unto Article IX of the Libel, respondent denies that respondent or the Dredge PACIFIC or its

Master or any of the members of its crew were in any respect or at all negligent as in said Libel alleged or at all negligent and denies that libelant has been damaged in the amount of $58,403.95 or in any other amount or at all. Respondent admits that libelant has demanded from Respondent the sum of $58,403.95 and that respondent has paid no part thereof. Respondent denies each and every allegation in said Article IX not herein otherwise admitted or denied.

X.

Answering unto Article X, respondent admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court but denies each and every, all and singular, the allegations of said Article not herein otherwise admitted or denied.

Wherefore respondent United States of America prays that the libel be dismissed with costs, and that it recover the damages prayed for in its cross-libel filed herewith.

LLOYD H. BURKE
United States Attorney
/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General
/s/ JOHN F. MEADOWS
Attorney, Department of Justice
Proctors for United States
of America.

Duly Verified.

Addidavit of Service by Mail Attached.

[Endorsed]: Filed July 3, 1957.

In the United States District Court
for the Northern District of California,
Southern Division
In Admiralty

No. 27359

WEYERHAEUSER STEAMSHIP COMPANY, a corporation,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Cross-Libelant,

vs.

The American Steamship F. E. WEYERHAEUSER, her engines, boilers, tackle, apparel and furniture, etc., and WEYERHAEUSER STEAMSHIP COMPANY, a corporation,

Cross-Respondent.

CROSS-LIBEL FOR COLLISION

To the Honorable, the Judges of the Southern Division of the United States District Court for the Northern District of California:

The cross-libel of the United States of America, a sovereign nation, as owner of the Army Corps of Engineers Dredge PACIFIC, against the American Steamship F. E. WEYERHAEUSER, her engines, boilers, tackle, apparel and furniture, etc., in rem, and

Weyerhaeuser Steamship Company, a corporation, in personam, in a cause of collision, civil and maritime, on information and belief alleges as follows:

I.

That cross-libelant is now and was during all the times herein mentioned, a sovereign nation, and the sole owner of the United States Army Corps of Engineers Dredge PACIFIC, an inspected, hopper-type dredge, not documented, of 837 gross tons, which was prior to and at the time of the collision hereinafter described tight, staunch and strong and in all respects seaworthy and properly manned, officered, equipped and supplied.

II.

That cross-respondent Weyerhaeuser Steamship Company is now and was during all the times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, having an office and place of business in the City and County of San Francisco, State of California, and is now and was during all the times herein mentioned the owner and operator of the American Steamship F. E. WEYERHAEUSER, Official Number 245564, a steel Liberty type cargo vessel of 7,218 gross tons, and the employer, at the time of the collision hereinafter mentioned, of the officers and crew of said vessel.

III.

That on or about July 18, 1956, said cross-respondent filed the original libel herein; that the said cross-respondent is within this district and within the jurisdiction of this Honorable Court; that the said Steam-

ship F. E. WEYERHAEUSER is now or, during the pendency of this action, will be within the navigable waters in the jurisdiction of this Honorable Court.

IV.

On September 8, 1955, at about the hour of 5:30 P.M. a collision occurred between the said Dredge PACIFIC and the F. E. WEYERHAEUSER off the coast of the State of Oregon near the entrance to the harbor at Coos Bay. The PACIFIC was enroute to Coos Bay, Oregon, from Bandon, Oregon, and the F. E. WEYERHAEUSER was enroute to Los Angeles, California, from Coos Bay. Visibility was restricted by fog and the PACIFIC, proceeding at reduced speed and with due regard for existing conditions, was sounding proper signals and maintaining a proper watch in the engine room and on deck, including a lookout on the forecastle head. The radar aboard the PACIFIC was in operation and properly guarded. While the PACIFIC was thus proceeding, the F. E. WEYERHAEUSER, travelling at excessively high speed in the fog, suddenly cut directly across the port bow of the PACIFIC, causing her starboard side to come into collision with the stem of the PACIFIC. At the time of this collision, the headway of the PACIFIC was practically stopped. The F. E. WEYERHAEUSER thereafter continued on and failed to stop. Though the Master of the F. E. WEYERHAEUSER well knew that his vessel had been in collision, he failed, all without reasonable cause and in

violation of 33 United States Code, Section 367, to stay by the PACIFIC and to offer or render or attempt to render any assistance that may have been practicable or necessary to save the Master and crew of the PACIFIC from any danger caused by the collision and also failed, until traced and located by the PACIFIC, to give to the Master of the PACIFIC the name of his own vessel and her port of registry and the ports from which and to which she was bound.

V.

That prior to and at the time of the said collision, the PACIFIC was properly manned and operated and in all respects observing and complying with the rules and laws governing a vessel in her situation. Said collision was in no way due to any act or fault on the part of cross-libelant, nor of the PACIFIC, nor of those in charge of her, but was due solely to the careless, reckless, and negligent navigation and operation of the F. E. WEYERHAEUSER in the following, among other, respects:

1. She failed to have on watch proper lookouts attentive to their duties and properly stationed;

2. Being in a fog and hearing the fog signals of the PACIFIC apparently forward of her beam, the position of the PACIFIC not then being ascertained, the F. E. WEYERHAEUSER did not, although the circumstances of the case required it, stop her engines

and then navigate with caution until the danger of collision should have passed;

3. She failed to use her radar and other navigational aids properly so as to avoid collision;

4. She operated prior to and at the time of the collision at excessive and immoderate speed under the circumstances and conditions existing at the time;

5. She failed to change her course to avoid collision as provided by the applicable rules and law;

6. She failed to stop her engines and reverse in time to avoid the collision;

7. She was unseaworthy both as to hull and equipment;

8. She failed to blow the whistles and signals required by the Rules of the Road;

9. She was at the time of the collision and immediately prior thereto, contrary to established custom and usage, navigating in an improper area for vessels outbound and southbound from Coos Bay, Oregon.

10. She did not have on watch proper and competent officers, engineers and helmsmen, nor were they attentive to their duties, but on the contrary said officers, engineers and helmsmen were incompetent and inattentive and failed to give, receive, and execute proper orders;

11. Said SS F. E. WEYERHAEUSER and her owners, operators, master and members of her crew

were at fault in other particulars of which cross-libelant is not at present fully advised and begs leave when so advised to offer proof of such negligent acts and to amend this libel to conform to said facts.

VI.

That as a direct and proximate result of said collision and the neglect and fault of cross-respondent and the SS F. E. WEYERHAEUSER as aforesaid, cross-libelant has sustained damage in the sum of $19,218.58, as nearly as now can be estimated, no part of which has been paid although duly demanded.

VII.

That all and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, cross-libelant prays:

1. That process in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the American Steamship F. E. WEYERHAEUSER, her engines, boilers, tackle, apparel and furniture, etc., and that all persons claiming any interest therein may be required to appear and answer on oath all and singular the matters aforesaid;

2. That cross-libelant may have a decree for its damages with interest and costs and that said American Steamship F. E. WEYERHAEUSER may be con-

demned and sold to satisfy the damages of the cross-libelant herein;

3. That process in due form of law according to the practice of this Honorable Court may issue under this cross-libel against cross-respondent Weyerhaeuser Steamship Company citing it to appear and answer on oath the allegations of this cross-libel, and that in default of such appearance and answer the proceedings under its original libel above-described be stayed;

4. That this Honorable Court may adjudge and decree that the cross-respondent Weyerhaeuser Steamship Company pay to the cross-libelant its damages as aforesaid with interest and costs;

5. That cross-libelant may have such other and further relief in the premises as in law and justice it may be entitled to receive.

LLOYD H. BURKE
United States Attorney
/s/ KEITH R. FERGUSON
Special Assistant to the
Attorney General
/s/ JOHN F. MEADOWS
Attorney, Department of Justice
Proctors for United States
of America.

Duly Verified.

[Endorsed]: Filed July 3, 1957.

In the United States District Court for the Northern District of California, Southern Division

In Admiralty

No. 27359

WEYERHAEUSER STEAMSHIP COMPANY, a corporation,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

ST. PAUL FIRE & MARINE INSURANCE CO., a corporation, and FIREMAN'S FUND INSURANCE CO., a corporation,

Intervening Libelants.

LIBEL IN INTERVENTION OF ST. PAUL FIRE & MARINE INSURANCE CO., A CORPORATION, AND FIREMAN'S FUND INSURANCE CO., A CORPORATION.

To the Honorable, the Judges of the above-entitled Court:

The libel in intervention of St. Paul Fire & Marine Insurance Co., a corporation, and Fireman's Fund Insurance Co., a corporation, in a cause civil and maritime against the United States of America arising out of the matters and things alleged in the original libel in the above captioned cause, respectfully alleges as follows:

I.

Intervenor St. Paul Fire & Marine Insurance Co. is and was at all relevant times a corporation organized

and existing under the laws of the State of Minnesota and transacting business as a marine insurer.

Intervenor Fireman's Fund Insurance Co. is and was at all relevant times a corporation organized and existing under the laws of the State of California and transacting business as a marine insurer.

II.

Respondent the United States of America is and was at all relevant times a sovereign which has by law consented to be sued herein.

III.

Upon information and belief, respondent is and was at all relevant times the owner and operator of the self-powered Dredge PACIFIC, an inspected hopper-type dredge, not documented, 837 gross tons.

IV.

Upon information and belief, said dredge PACIFIC is and was at all relevant times operated as a public vessel of the United States and was within the navigable waters of the Northern District of California during the pendency of process herein.

V.

Intervenors file this libel under the provisions of the Public Vessels Act, 46 U. S. Code, sections 781-90, and elect to proceed in accordance with the principles of in rem as well as in personam liability.

VI.

At or about 1730 hours on September 8, 1955, the dredge PACIFIC was in collision with the American Steamer F. E. WEYERHAEUSER, official No. 245,-

564, in the waters of the Pacific Ocean just off the mouth of Coos Bay, Oregon. Upon information and belief, the weather was foggy at time of collision, with poor visibility, a smooth sea and variable breezes. Upon information and belief, said collision was directly and proximately caused by the negligent navigation of the Dredge PACIFIC in the following respects:

1. Although the PACIFIC and the WEYERHAEUSER approached, in position to meet and pass starboard to starboard, the PACIFIC failed to do so, and instead turned to her right across the path of the WEYERHAEUSER and struck the latter on the starboard side.

2. The PACIFIC negligently failed to maintain a constant course of any sort, but changed course several times so erratically that the WEYERHAEUSER, even with the use of radar, was unable to forecast or anticipate the movements of the PACIFIC or to take any effective measures to avoid being struck.

3. The PACIFIC was operated at a dangerous and excessive rate of speed under the conditions of fog and impaired visibility then prevailing.

4. The PACIFIC failed to maintain a proper or competent lookout.

5. The master and crew of the PACIFIC failed to take proper or any steps to avoid collision after becoming aware of the presence of the WEYERHAEUSER.

6. The PACIFIC was improperly and carelessly navigated and maintained in other respects, of which intervenors are now presently informed; intervenors pray leave to amend this libel in intervention by setting forth such additional faults when the same become known.

VII.

At the time of said collision the WEYERHAEUSER had a cargo of lumber on board (loaded at Olympia, Raymond, Long View and Coos Bay) and was under way for Baltimore, Brooklyn and Port Newark on the East Coast of the United States. As a result of the collision the WEYERHAEUSER was so badly damaged that she was reasonably compelled to, and did, put into a port of refuge, Portland, Oregon, where general average expenses were reasonably and necessarily incurred in off-loading part of her cargo, making temporary repairs, and re-loading.

VIII.

Thereafter, in accordance with maritime law and practice, the owner of the WEYERHAEUSER caused a general average to be declared, adjusted and stated, and as a final result of the general average statement the cargo of lumber on board the WEYERHAEUSER at the time of collision was found and stated to be indebted to the shipowner in the total sum of $20,490.14 as and for its general average obligation arising out of said collision.

IX.

Prior to the start of the voyage on which the WEYERHAEUSER was engaged at the time of the collision, intervenor Fireman's Fund Insurance Co. had issued its policy of marine insurance covering a shipment of 68,640 pieces of lumber shipped by Twin Harbor Lumber Co. at Raymond and consigned to the order of the shipper at Brooklyn, which said shipment was aboard the WEYERHAEUSER at the time of the collision.

In and by the aforesaid general average statement said shipment of lumber was legally obligated for a general average contribution of $923.85. By virtue of the terms and conditions of its said marine insurance policy, intervenor Fireman's Fund Insurance Co. was obligated to, and did hereofore, pay the said amount to the owner of the WEYERHAEUSER on behalf of said shipment, in satisfaction of such general average liability. Said intervenor thereby and thereupon succeeded and became subrogated to the rights of the shipper, consignee and owner of said shipment against respondent herein.

X.

Prior to the start of the voyage on which the WEYERHAEUSER was engaged at the time of the collision, intervenor St. Paul Fire & Marine Insurance Co. had issued its policies of marine insurance covering all other shipments then on board the WEYERHAEUSER except for four minor interests. In and by the aforesaid general average statement, the shipments so insured by said intervenor were legally obligated for general average contributions totaling $19,122.75.

By virtue of the terms and conditions of its said marine insurance policies, intervenor St. Paul Fire & Marine Insurance Co. was obligated to, and did heretofore, pay the said amount to the owner of the WEYERHEAUSER on behalf of the shipments so insured, in satisfaction of said general average liability. Said intervenor thereby and thereupon succeeded and became subrogated to the rights of the shippers, consignees and owners of said shipments against respondent herein.

XI.

By reason of the negligent operation of the PACIFIC, intervening libelants have been damaged in the sums of $19,122.75 for St. Paul Fire & Marine Insurance Co. and $923.85 for Fireman's Fund Insurance Co., as above set forth in detail.

XII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore intervening libelants pray that they be permitted to file this, their libel in intervention, in the above entitled cause; that respondent be required to appear and answer all and singular the matters aforesaid; that intervening libelants have and recover from respondent their damages, together with interest and costs; and that intervening libelants have all such other and further relief as may be just and proper in the premises.

Dated: July 30, 1957.

/s/ STANLEY J. COOK

DERBY, COOK, QUINBY & TWEEDT

Proctors for Intervening Libelants

Duly Verified.

[Endorsed]: Filed July 30, 1957.

In the United States District Court for the Northern District of California, Southern Division

In Admiralty

No. 27359

WEYERHAEUSER STEAMPSHIP COMPANY, corporation,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Cross Libelant,

vs.

The American Staemship F. E. WEYERHAEUSER, etc., and WEYERHAEUSER STEAMSHIP COMPANY, a corporation,

Cross Respondent.

ST. PAUL FIRE & MARINE INSURANCE CO., a corporation, and FIREMAN'S FUND INSURANCE CO., a corporation,

Intervening Libelants.

ANSWER TO LIBEL IN INTERVENTION

Comes Now respondent United States of America and for answer to the libel in intervention of St. Paul Fire & Marine Insurance Co., and Fireman's Fund In-

surance Co., in a cause civil and maritime against the United States of America, admits, denies and alleges as follows:

I.

Answering unto Article I, respondent admits the allegations thereof.

II.

Answering unto Article II, respondent admits that it was and still is a sovereign nation; respondent alleges that the remaining allegations of said article present questions of law for the determination of the Court and require no answer.

III.

Answering unto Article III, respondent admits the allegations thereof.

IV.

Answering unto Article IV, respondent admits the allegations thereof.

V.

Answering unto Article V, respondent alleges that the allegations thereof present matters for the attention of the court and require no answer.

VI.

Answering unto Article VI, respondent alleges that at about the hour of 1730 on September 8, 1955, a collision occurred between the Dredge PACIFIC and the American Steamer F. E. WEYERHAEUSER, of-

ficial No. 245,564 in the waters of the Pacific Ocean; that at the time of the collision the weather was foggy, visibility poor, the sea smooth, and variable breezes blowing; respondent denies each and every, all and singular, the remaining allegations of said article not herein otherwise admitted or denied.

Further answering unto said Article VI respondent alleges that said collision was in no way due to any act or fault on the part of United States, nor of the PACIFIC, nor of those in charge of her, but was due solely to the careless, reckless, and negligent navigation and operation of the F. E. WEYERHAEUSER in the following, among other, respects:

1. She failed to have on watch proper lookouts attentive to their duties and properly stationed;

2. Being in a fog and hearing the fog signals of the PACIFIC apparently forward of her beam, the position of the PACIFIC not then being ascertained, the F. E. WEYERHAEUSER did not, although the circumstances of the case required it, stop her engines and then navigate with caution until the danger of collision should have passed;

3. She failed to use her radar and other navigational aids properly so as to avoid collision;

4. She operated prior to and at the time of the collision at excessive and immoderate speed under the circumstances and conditions existing at the time;

5. She failed to change her course to avoid collision as provided by the applicable rules and law;

6. She failed to stop her engine and reverse in time to avoid the collision;

7. She was unseaworthy both as to hull and equipment;

8. She failed to blow the whistles and signals required by the Rules of the Road;

9. She was at the time of the collision and immediately prior thereto, contrary to established custom and usage, navigating in an improper area for vessels outbound and southbound from Coos Bay, Oregon.

10. She did not have on watch proper and competent officers, engineers and helmsmen, nor were they attentive to their duties, but on the contrary said officers, engineers and helmsmen were incompetent and inattentive and failed to give, receive, and execute proper orders;

11. Said SS F. E. WEYERHAEUSER and her owners, operators, master and members of her crew were at fault in other particulars of which United States is not at present fully advised and begs leave when so advised to offer proof of such negligent acts and to amend this answer to conform to said facts.

VII.

Answering unto Article VII, respondent alleges that it has no information or belief sufficient to answer the

allegations of said Article VII and upon that ground denies each and every, all and singular the allegations thereof.

VIII.

Answering unto Article VIII, respondent alleges that it has no information or belief sufficient to answer the allegations of said Article VIII and upon that ground denies each and every, all and singular the allegations thereof.

IX.

Answering unto Article IX, respondent alleges that it has no information or belief sufficient to answer the allegations of said Article IX and upon that ground denies each and every, all and singular the allegations thereof.

X.

Answering unto Article X, respondent alleges that it has no information or belief sufficient to answer the allegations of said Article X and upon that ground denies each and every, all and singular the allegations thereof.

XI.

Answering unto Article XI of the libel, respondent denies that respondent or the Dredge PACIFIC or its Master or any of the members of its crew were in any respect or at all negligent as in said libel in intervention alleged or at all negligent and denies that libelant in intervention St. Paul Fire & Marine Insurance Co.

has been damaged in the sum of $19,122.75 or in any other sum or at all and denies that libelant in intervention Fireman's Fund Insurance Co. has been damaged in the sum of $923.85 or in any other sum or at all. Respondent denies each and every allegation in said article not herein otherwise admitted or denied.

XII.

Answering unto Article XII, respondent admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court but denies each and every, all and singular, the allegations of said article not herein otherwise admitted or denied.

Wherefore respondent United States of America prays that the libel in intervention be dismissed with costs.

LLOYD H. BURKE
United States Attorney

/s/ KEITH R. FERGUSON
Special Assistant to the
Attorney General

/s/ JOHN F. MEADOWS
Attorney, Department of Justice
Proctors for United States
of America.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Oct. 29, 1957.

In the United States District Court for the Northern District of California, Southern Division

In Admiralty

No. 27359

WEYERHAEUSER STEAMSHIP COMPANY, a corporation

Libelant,

vs.

UNITED STATES OF AMERICA

Respondent.

UNITED STATES OF AMERICA

Cross Libelant,

vs.

The American Steamship F. E. WEYERHAEUSER, her engines, boilers, tackle, apparel and furniture, etc., and WEYERHAEUSER STEAMSHIP COMPANY, a corporation

Cross Respondent.

ANSWER TO CROSS LIBEL FOR COLLISION

Comes now cross respondent Weyerhaeuser Steamship Company, a corporation, and for answer to the cross libel in rem and in personam of the United States of America as owner of the Dredge PACIFIC in a cause of collision, civil and maritime, admits, denies and alleges as follows:

I.

Answering unto Article I, admits that cross libelant is a sovereign nation and sole owner and operator of the United States Army Corps of Engineers Dredge PACIFIC, an inspected hopper-type dredge, not documented, of 837 gross tons; denies each and every, all and singular, the remaining allegations of said article not herein otherwise admitted.

II.

Answering unto Article II, admits the allegations thereof.

III.

Answering unto Article III, admits the allegations thereof.

IV.

Answering unto Article IV, admits that on September 8, 1955, at about the hour of 5:30 P.M., a collision occurred between the said Dredge PACIFIC and the F. E. WEYERHAEUSER off the coast of the State of Oregon, near the entrance to the harbor of Coos Bay; admits that the Dredge PACIFIC was enroute to Coos Bay, Oregon, from Bandon, Oregon, and the F. E. WEYERHAEUSER was enroute to Los Angeles, California, from Coos Bay; denies each and every, all and singular, the remaining allegations of said article not herein otherwise admitted or denied.

V.

Answering unto Article V, denies each and every, all and singular, the allegations contained therein.

VI.

Answering unto Article VI, denies that as a direct and proximate result of said collision and neglect and fault of the cross respondent and/or the SS F. E. WEYERHAEUSER, cross libelant has sustained damages in the sum of $19,218.58, or in any other amount or at all; admits that demand for payment has been made and that no part of the payment demanded has been paid.

VII.

Answering unto Article VII, denies each and every, all and singular, the allegations contained therein.

Wherefore cross respondent Weyerhaeuser Steamship Company prays that the cross libel be dismissed with costs, and that it recover the damages prayed for in its libel filed heretofore.

/s/ GRAHAM, JAMES and ROLPH

/s/ DAN J. HENDERSON

Proctors for Libelant and
Cross Respondent Weyerhaeuser
Steamship Company.

Duly Verified.

[Endorsed]: Filed Oct. 30, 1957.

In the United States District Court for the Northern District of California, Southern Division

In Admiralty

No. 27359

WEYERHAEUSER STEAMSHIP COMPANY, a corporation,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Cross-Libelant,

vs.

The American Steamship F. E. WEYERHAEUSER, etc., and WEYERHAEUSER STEAMSHIP COMPANY, a corporation,

Cross-Respondent.

ST. PAUL FIRE & MARINE INSURANCE CO., a corporation, and FIREMAN'S FUND INSURANCE CO., a corporation,

Intervening Libelants.

CONSENT TO AMENDMENT OF LIBEL.

While recognizing that the law in any event would permit libelant to amend its libel herein by adding to the amount of damages prayed for any sums recovered

from it on account of personal injury in that certain action entitled Ostrom v. Weyerhaeuser Steamship Co. No. 4255 in the United States District Court for the Western District of Washington, or to prove such damages without amendment, respondent United States, nevertheless hereby formally consents that such amendment be made and that the amount of the damages prayed for in the libel be henceforth deemed so amended.

LLOYD H. BURKE
United States Attorney

/s/ KEITH R. FERGUSON
Special Assistant to the
Attorney General

/s/ JOHN F. MEADOWS
Attorney, Admiralty and
Shipping Section Department
of Justice

Proctors for United States
of America.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 22, 1958.

[Title of District Court and Cause.]

ANCILLARY PETITION FOR INJUNCTION AND TEMPORARY RESTRAINING ORDER

To the Honorable, the Judges of the United States District Court for the Northern District of California Sitting in Admiralty:

The Ancillary Petition of respondent and cross-libelant United States of America for Injunction and Temporary Restraining Order in aid of jurisdiction herein under Title 28 U.S.C., Section 1651 respectfully shows:

I.

On September 8, 1955 a collision occurred between the Dredge PACIFIC, a public vessel of the United States and the SS F. E. WEYERHAEUSER, owned and operated by libelant Weyerhaeuser Steamship Company which resulted in substantial damage to both vessels and the declaration of a General Average requiring contribution from the owners of cargo aboard the SS F. E. WEYERHAEUSER.

II.

On July 18, 1956 libelant filed its libel herein in rem and in personam principles seeking to recover its collision damages from respondent United States under the Public Vessels Act. Such damages which would be recoverable should libelant prevail include not only damage to libelant's vessel but sums which libelant may be called upon to pay to third parties by reason of the said collision. Respondent United States has answered the libel and filed herein its cross-libel seeking its damages arising from the said collision. Libelant and cross-

respondent has answered the cross-libelant. A libel in intervention by underwriters of cargo aboard the SS F. E. WEYERHAEUSER has been filed and the case is fully at issue.

III.

The jurisdiction and venue of the subject matter of this action, to wit: the rights and liabilities of the parties hereto arising from the said collision are established exclusively in the United States District Court for the Northern District of California by reason of the action herein.

IV.

One Reynold E. Ostrom, a member of the crew of the Dredge PACIFIC at the time of the said collision, has filed against Weyerhaeuser Steamship Co. in the United States District Court for the Western District of Washington a certain action entitled Ostrom v. Weyerhaeuser Steamship Co., Civil No. 4255 in which he seeks by action of the law to recover damages from Weyerhaeuser Steamship Co. for injuries which he claims to have suffered by reason of the said collision.

V.

The libelant herein has moved in the said action in the Western District of Washington for leave to file a third-party complaint against respondent United States claiming that the United States is at fault and liable for damages suffered as a result of the said collision. On April 21, 1958, the United States District Court for the Western District of Washington granted the said motion to implead, notwithstanding objections by the United States that this Court has exclusive jurisdiction herein and that the United States District

Court for the Western District of Washington has neither jurisdiction nor venue of such third-party complaint. A motion for reconsideration of the said order allowing impleader has been made and is now pending.

VI.

The Dredge PACIFIC on April 21, 1958 and prior thereto was, and until about May 24, 1958 at the very least, will be located at Portland, Oregon, within the District of Oregon.

VII.

Trial of the case of Ostrom vs. Weyerhaeuser Steamship Co. in the United States District Court of the Western District of Washington is presently set for May 20, 1958, and the Court in the said case in granting the said motion to implead the United States has ordered that such impleader will not be permitted to result in a continuance.

VIII.

Libelant's proposed third-party suit against the United States in the Western District of Washington is a vexatious suit and a contumacious encroachment upon the exclusive jurisdiction of this Court.

IX.

The said third-party action is seriously prejudicial to the respondent United States herein in that it seeks to split the cause of action and impose upon respondent the burden of trying this collision case twice, of going to trial the first time upon approximately 30 days' notice without even the time allowed for pleading and discovery, of going to trial at law rather than in admiralty in a district in which venue is not properly

laid, and of running the risk that a judgment obtained in such circumstances might be asserted as res judicata in the principal collision action pending herein. An immediate restraining order is required to prevent immediate and irreparable injury, loss or damage by the filing and service of the said third-party complaint, and by the issuance of various orders thereunder upon motion of the libelant, the filing and issuance of which might necessitate the participation of respondent in the trial of the said action in the Western District of Washington notwithstanding that libelant might subsequently be restrained by injunction herein.

X.

All and singular, the premises are true.

Wherefore, respondent and cross-libelant United States of America prays that the Court issue ex parte its temporary restraining order and order to show cause restraining libelant herein from instituting or prosecuting the said third-party action in the United States District Court for the Western District of Washington and ordering libelant to show cause upon due hearing why a preliminary injunction should not issue further restraining the institution or prosecution of the said action, and that the Court permanently enjoin the institution for prosecution of such third-party action.

LLOYD H. BURKE
United States Attorney

/s/ KEITH R. FERGUSON
Special Assistant to the
Attorney General

/s/ GRAYDON S. STARING
Attorney, Admiralty and
Shipping Section,
Department of Justice.

/s/ JOHN F. MEADOWS
Attorney, Admiralty and
Shipping Section,
Department of Justice
Proctors for United States
of America.

Duly Verified.

[Endorsed]: Filed April 22, 1958.

[Title of District Court and Cause.]

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

Whereas in this cause it has been made to appear by the verified Ancillary Petition for Injunction and Temporary Restraining Order filed herein which was on this 22nd day of April, 1958 presented to the Honorable Louis E. Goodman, Judge of the United States District Court for the Northern District of California, that a restraining order preliminary to hearing upon the issuance of preliminary injunction should issue, without notice because immediate and irreparable injury, loss or damage will result to the respondent before notice can be served and a hearing had thereon, in that libelant may in the meantime file and serve a third-party complaint upon respondent in that certain action entitled

Ostrom vs. Weyerhaeuser Steamship Co., Civil No. 4255 in the United States District Court for the Western District of Washington and make such motions and secure such orders therein as to render ineffective the injunction prayed for herein by making it necessary for respondent herein, in order to protect its interests adequately, to appear and defend the said third-party complaint notwithstanding the exclusive jurisdiction of this Court, and whereas notice and a hearing before entering a temporary restraining order in the present circumstances should not be required inasmuch as the material facts are supported by the record herein, now therefore

It Is Ordered that libelant, its agents, successors, deputies, servants and employees and all persons acting by, come through or under them or any of them or by or through their order, be, and they are hereby, restrained until Monday, April 28, 1958, from filing, instituting, or prosecuting any third-party complaint, acton or proceeding whatever against respondent United States of America in that certain action entitled Ostrom vs. Weyerhaeuser Steamship Co., Civil No. 4255, in the United States District Court for the Western District of Washington, and it is

Further Ordered that libelant by its proctors herein be and appear before this Court in the Master Calendar Department thereof Monday, April 28, 1958, then and there to show cause, if any there be, why a preliminary injunction should not be issued further restraining libelants as aforesaid pending the disposition of the present action herein, and it is

/s/ GRAYDON S. STARING
Attorney, Admiralty and
Shipping Section,
Department of Justice.

/s/ JOHN F. MEADOWS
Attorney, Admiralty and
Shipping Section,
Department of Justice
Proctors for United States
of America.

Duly Verified.

[Endorsed]: Filed April 22, 1958.

[Title of District Court and Cause.]

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

Whereas in this cause it has been made to appear by the verified Ancillary Petition for Injunction and Temporary Restraining Order filed herein which was on this 22nd day of April, 1958 presented to the Hon orable Louis E. Goodman, Judge of the United States District Court for the Northern District of California, that a restraining order preliminary to hearing upon the issuance of preliminary injunction should issue, without notice because immediate and irreparable injury, loss or damage will result to the respondent before notice can be served and a hearing had thereon, in that libelant may in the meantime file and serve a third-party complaint upon respondent in that certain action entitled

Ostrom vs. Weyerhaeuser Steamship Co., Civil No. 4255 in the United States District Court for the Western District of Washington and make such motions and secure such orders therein as to render ineffective the injunction prayed for herein by making it necessary for respondent herein, in order to protect its interests adequately, to appear and defend the said third-party complaint notwithstanding the exclusive jurisdiction of this Court, and whereas notice and a hearing before entering a temporary restraining order in the present circumstances should not be required inasmuch as the material facts are supported by the record herein, now therefore

It Is Ordered that libelant, its agents, successors, deputies, servants and employees and all persons acting by, come through or under them or any of them or by or through their order, be, and they are hereby, restrained until Monday, April 28, 1958, from filing, instituting, or prosecuting any third-party complaint, acton or proceeding whatever against respondent United States of America in that certain action entitled Ostrom vs. Weyerhaeuser Steamship Co., Civil No. 4255, in the United States District Court for the Western District of Washington, and it is

Further Ordered that libelant by its proctors herein be and appear before this Court in the Master Calendar Department thereof Monday, April 28, 1958, then and there to show cause, if any there be, why a preliminary injunction should not be issued further restraining libelants as aforesaid pending the disposition of the present action herein, and it is

Further Ordered that service of this order be made upon libelant by serving the order upon libelant's proctors of record herein or any of them.

Issued at 4 o'clock P.M. this 22nd day of April, 1958.

/s/ LOUIS E. GOODMAN,
United States District Judge

[Endorsed]: Filed April 22, 1958.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANCILLARY PETITION FOR INJUNCTION AND TEMPORARY RESTRAINING ORDER.

It is clear that libelant is attempting to file against respondent in another district a third-party complaint, the subject matter of which is the same as the subject matter of the present action, to wit: the liability of the parties hereto with respect to a certain collision of the Dredge PACIFIC and the SS F. E. WEYERHAEUSER. The material facts are set forth in the Ancillary Petition, itself.

Even in cases of concurrent jurisdiction, which is not the case here, the court which first takes jurisdiction acquires an exclusive jurisdiction to proceed to the decision of the case.

French v. Hay, 22 Wall. 250, 22 L. Ed. 857 (1875);

Ex parte, City Bank of New Orleans, 3 How. 292, 314 11 L. Ed. 603, 613 (1845);

Smith v. McIver, 9 Wheat. 532, 535 6 L. Ed. 152, 154 (1824);

The appropriate procedure in a case like the present one is for the court first acquiring jurisdiction, whether acting under 28 U.S.C. 1651 or its inherent powers, to enjoin the party before it from prosecuting an action on the same subject matter elsewhere.

Steelman v. All Continent Corp., 301 U. S. 278, 288 81 L. Ed. 1085, 1092 (1937);

Gage v. Riverside Trust Co., 86 Fed. 984, 999 (C. C. Cal. 1898);

Higgins v. California Prune & Apricot Growers, 282 Fed 550 (2d Cir. 1922);

Cresta Blanca Wine Co. v. Eastern Wine Corp., 143 F. 2d 1012 (2d Cir. 1944);

Crosley Corporation v. Westinghouse Electric & Manufacturing Co., 130 F. 2d 474 (3d Cir. 1942) Cert. denied, 317 U.S. 681;

Crosley Corporation v. Hazeltine Corporation, 122 F. 2d 925 (3d Cir. 1941) Cert. denied, 315 U.S. 813;

In re Georgia Power Co., 89 F. 2d 218 (5th Cir. 1937) Cert. denied, 302 U. S. 692;

Urbin v. Knapp Bros. Manufacturing Company, 217 F. 2d 810 (6th Cir. 1954);

Milwaukee Gas Specialty Co. v. Mercoid Corp., 104 F. 2d 589 (7th Cir. 1939);

Chicago Pneumatic Tool Co. v. Hughes Tool Co., 180 F. 2d 97 (10th Cir. 1950) Cert. denied 340 U. S. 816;

Food Fair Stores v. Square Deal Market Co., 187 F. 2d 219 (D. C. Cir. 1950);

Speed Products Co. v. Tinnerman Products, 171 F. 2d 727 (D. C. Cir. 1949);

See The Christiansborg, L. R. 10 Prob. 141, 152 (Court of Appeal 1885).

The filing of a second suit on the same subject matter in another jurisdiction in circumstances such as these is prima facie vexatious and the burden is upon the party so suing to show good cause for such suit.

Higgins v. California Prune & Apricot Growers, 282 Fed. 550 (2d Cir. 1922);

See The Christiansborg, L. R. 10 Prob. 141, 152 (Court of Appeal 1885).

LLOYD H. BURKE
United States Attorney
/s/ KEITH R. FERGUSON
Special Assistant to the
Attorney General
/s/ GRAYDON S. STARING
Attorney, Admiralty and
Shipping Section
Department of Justice
/s/ JOHN F. MEADOWS
Attorney, Admiralty and
Shipping Section
Department of Justice
Proctors for United States
of America.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 24, 1958.

[Title of District Court and Cause.]

ORDER FOR WRIT OF INJUNCTION

The libelant Weyerhaeuser Steamship Company having filed its libel herein on July 18, 1956 seeking recovery of damages from respondent United States of America on account of a certain collision on September 8, 1955 between the Dredge PACIFIC, a public vessel of the United States, and the SS F. E. WEYERHAEUSER, owned and operated by libelant, and both libelant and respondent having appeared by their respective proctors and respondent having filed herein on April 22, 1958 its Ancillary Petition for Injunction and Temporary Restraining Order praying that libelant be enjoined from prosecuting a certain third-party action against respondent in another district for damages arising from the same collision and a temporary restraining order having issued as prayed for April 22, 1958 and the libelant having now consented to the entry of this Order without contest,

It Is Hereby Ordered, Adjudged and Decreed:

That this Court has exclusive jurisdiction of the subject matter and jurisdiction of all persons and parties hereto.

That a permanent injunction issue out of and under the seal of this Court directed to the libelant, Weyerhaeuser Steamship Company, its agents, successors, deputies, servants, employees, attorneys proctors, and all persons acting by, through, or under them or any of them or by or through the order of any of them, enjoining and restraining them and each of them from

filing, instituting, or prosecuting any third-party complaint, action, or proceeding whatever against respondent United States of America in that certain action entitled Ostrom v. Weyerhaeuser Steamship Co., Civil No. 4255 in the United States District Court for the Western District of Washington.

Dated: April 28, 1958.

/s/ LOUIS E. GOODMAN
United States District Judge

Entry Consented to:

/s/ GRAHAM, JAMES & ROLPH

/s/ HENRY R. ROLPH
Proctors for Libelant

LLOYD H. BURKE
United States Attorney

/s/ KEITH R. FERGUSON
Special Assistant to the
Attorney General

/s/ GRAYDON S. STARING
Attorney, Admiralty and
Shipping Section
Department of Justice

/s/ JOHN F. MEADOWS
Attorney, Admiralty and
Shipping Section
Department of Justice

Proctors for Respondent
and Petitioner

[Endorsed]: Filed April 28, 1958.

[Title of District Court and Cause.]

WRIT OF INJUNCTION

The President of the United States of America, to Weyerhaeuser Steamship Company, a corporation of the State of Delaware having an office and place of business at San Francisco, California, and its agents, successors, deputies, servants, employees, attorneys, proctors, and all persons acting by, through, or under them or any of them and to each and every one of you, Greeting:

Whereas, respondent United States of America has heretofore filed an Ancillary Petition for Injunction and Temporary Restraining Order herein in the United States District Court for the Northern District of California against you and each of you for certain relief as therein set forth and has obtained an order and allowance of a permanent injunction as prayed for in the said Ancillary Petition;

Now, Therefore, we having regard to the matters in the said Ancillary Petition contained, do hereby command and strictly enjoin you, the said Weyerhaeuser Steamship Company, your agents, successors, deputies, servants, employees, attorneys, proctors, and all persons acting by, through, or under them or any of them and each of you to refrain and desist wholly from filing, instituting, or prosecuting any third-party complaint, action, or proceeding whatever against respondent United States of America in that certain action entitled Ostrom v. Weyerhaeuser Steamship Co., Civil No. 4255 in the United States District Court for the Western District of Washington, which commands and injunctions you are respectively required to observe and obey;

And hereof fail not under penalty of law thence ensuing.

Witness, the Honorable Louis E. Goodman Judge of said Court, at the City and County of San Francisco, in the Northern District of California, this 28th day of April, 1958.

[Seal] C. W. CALBREATH
Clerk.

/s/ By J. P. WELSH
Deputy Clerk.

Return of Service of Writ Attached.

[Endorsed]: Filed April 30, 1958.

[Title of District Court and Cause.]

STIPULATION FOR AMENDMENT TO CROSS-LIBEL

It Is Hereby Stipulated by and between the parties hereto that Cross-Libelant United States of America may amend its Cross-Libel in the instant cause by changing Article VI thereof to read as follows:

VI.

That as a direct and proximate result of said collision and the neglect and fault of cross-respondent and the SS F. E. WEYERHAEUSER as aforesaid, cross-libelant has sustained damage in the sum of $19,218.58,

as nearly as now can be estimated, no part of which has been paid although duly demanded, and in the further sum or sums which, in the event of a recovery against cross-libelant by the intervening libelants herein, may be awarded said intervening libelants against cross-libelant.

GRAHAM, JAMES & ROLPH

/s/ HENRY R. ROLPH

Proctors for Libelant

ROBERT H. SCHNACKE

United States Attorney

/s/ KEITH R. FERGUSON

Special Assistant to
Attorney General

/s/ JOHN F. MEADOWS

Attorney, Admiralty and
Shipping Section,
Department of Justice

Proctors for United States
of America.

It is so Ordered:

Oct. 8, 1958.

/s/ EDWARD P. MURPHY

United States District Judge

[Endorsed]: Filed Oct. 8, 1958.

[Title of District Court and Cause.]

AMENDMENT TO CROSS-LIBEL

Pursuant to the Stipulation of the parties, and order of the Court dated October 8, 1958, cross-libelant hereby amends its cross-libel by changing Article VI thereof to read as follows:

VI

That as a direct and proximate result of said collision and the neglect and fault of cross-respondent and the SS F. E. Weyerhaeuser as aforesaid, cross-libelant has sustained damage in the sum of $19,218.58, as nearly as now can be estimated, no part of which has been paid although duly demanded, and in the further sum or sums which, in the event of a recovery against cross-libelant by the intervening libelants herein, may be awarded said intervening libelants against cross-libelant.

ROBERT H. SCHNACKE
United States Attorney
/s/ KEITH R. FERGUSON
Special Assistant to
Attorney General
/s/ JOHN F. MEADOWS
Attorney, Admiralty and
Shipping Section,
Department of Justice
Proctors for United States
of America

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Oct. 8, 1958.

[Title of District Court and Cause.]

Graham James & Rolph, 310 Sansome Street San Francisco 4, Proctors for Libelant and Cross-Respondent Weyerhaeuser.

Robert H. Schnacke, United States Attorney; Keith R. Ferguson, Special Asst. to the Attorney General; John F. Meadows, Attorney, Admiralty and Shipping Section, Department of Justice, Post Office Building San Francisco 1, Proctors for United States of America.

Derby, Cook, Quinby & Tweedt, 1000 Merchants Exchange Building, San Francisco 4, Proctors for Intervening Libelant.

MEMORANDUM OPINION

Roche, Judge:

This is an action by libelant, owner of the F. E. WEYERHAEUSER, brought under the provisions of Public Vessels Act, 46 U. S. C. 781 et seq., against respondent, owner of the PACIFIC, for damages sustained by the WEYERHAEUSER in a collision between the two vessels. Cross-libel by respondent for damages suffered by the Pacific.

At 5:30 P.M. on September 8, 1955, the WEYERHAEUSER, a steel "Liberty" type cargo vessel 441 feet long with a gross tonnate of 7218 tons, and the PACIFIC, a steel hopper dredge of 837 tons and 180 feet in length, collided approximately one and one-half miles west and slightly south of Cape Arago light off the Oregon coast.

At the time of the collision the sea was calm with variable breezes. There was dense fog and visibility was poor.

The WEYERHAEUSER was southbound from Coos Bay, Oregon to Los Angeles carrying a cargo of lumber. The PACIFIC was northbound from Bandon, Oregon to Coos Bay without cargo. Each vessel alleges having radar knowledge of the other's progress on an opposing course 18 minutes prior to the collision, at which time the two were 2.8 miles apart. Each remained almost continuously cognizant, by radar, of the other's position and bearing up to the time of the collision. The WEYERHAEUSER made at least one course change to port between 5:00 P.M. and the collision and was under way with her only lookout positioned on the bridge. The PACIFIC made three course changes to starboard in the half-hour preceding the collision. The bow of the PACIFIC collided with the starboard side of the WEYERHAEUSER and the two vessels parted again almost immediately. Communications were established some 30 minutes later and the vessels were able to proceed back to port unassisted.

Having considered the evidence, the law and the briefs and arguments of counsel, the court makes the following findings of fact with respect to each vessel.

The Weyerhaeuser

Respondent contends that the lookout on the WEYERHAEUSER was improperly positioned. It is undisputed that at the time of the collision no lookout was stationed in the bow of the WEYERHAEUSER, although one was positioned on the bridge. Rule 29

of the International Rules for Navigation at Sea requires that a proper lookout be kept.[1] The Rules themselves do not prescribe where the lookout must be posted, but the courts have been rigid in holding that lookouts must be stationed as far forward as possible, especially when vessels are proceeding under conditions of reduced or obstructed visibility. The Ottawa, 70 U. S. (3 Wall.) 268 (1865); The Adrastus, 190 F. 2d 883 (2d Cir. 1951); The Bucentaur-Wilson Victory, 125 F. Supp. 42 (S. D. N. Y. 1954). The WEYERHAEUSER's knowledge that another vessel was approaching would make the command even more imperative. The record reveals no substantial evidence that weather or topographical conditions excused compliance with the rule. The requirement is so strict that the presumption of contributory fault arising from its neglect is the same as that created by statutory violation. The Adrastus, supra; The Bucentaur-Wilson Victory, supra. Thus, the WEYERHAEUSER is liable for her fault unless she can show that it did not and could not have contributed to the collision. The Pennsylvania, 86 U. S. (19 Wall.) 125 (1873). She failed to do this; a bow lookout, being closer to the PACIFIC when she was sighted, might have given earlier warning and the time gained might have enabled the WEYERHAEUSER to avoid the collision.

Rule 16 of the International Rules states that a vessel proceeding under conditions of restricted visibility shall go at a "moderate" speed.[2] Such a speed is one that

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[1] 33 U. S. C. 147a.
[2] 33 U. S. C. 145n.

would enable a vessel to stop in one-half the range of visibility. The Silver Palm, 94 F. 2d 754 (9th Cir. 1938). Libelant contends that visibility was 375 feet. Assuming arguendo that figure to be correct, a "moderate" speed would have allowed the WEYERHAEUSER to stop in half that distance, or 188 feet from the forwardmost point on the ship that lookout was maintained. As the distance from bow to bridge on the WEYERHAEUSER is 205 feet, and the forwardmost lookout was positioned on the bridge, it follows that no speed could have been "moderate" under the circumstances. The evidence is convincing that the WEYERHAEUSER was moving fast when the two ships collided. The nature of the damage, the distance she traveled after collision, inadvertent admissions from her crew, dubious log and bell book entries and testimony from those aboard the PACIFIC who observed her all lead to that conclusion. And it is undisputed that she was under way until minutes before impact, with the same conditions prevailing. Again, the WEYERHAEUSER was unable to sustain the burden imposed upon her by statutory violation. The Pennsylvania, supra. She is liable for contributory fault on a second count.

Rule 18 provides that when two vessels are meeting end on, or nearly so, each shall alter course to starboard so as to effect a port to port passing.[3] The record discloses that the WEYERHAEUSER and the PACIFIC admit detecting each other on opposing courses as early as 5:12 P.M. The PACIFIC turned

[3] 33 U. S. C. 146b.

to starboard but the WEYERHAEUSER turned to port, and again they were on collision courses. Rule 18, written before the advent of radar as an aid to navigation, specifically refers to instances in which the vessels or their lights are visible to each other. This court can see no reason why its application should not extend to a situation in which two vessels "see" each other by radar.

It is argued that under the conditions of the instant case a right turn was not warranted because neither vessel could know that the other had radar and would abide by the rules. But even if the PACIFIC had not had radar and had maintained a straight course, a right turn by the WEYERHAEUSER would have avoided the collision and the same is true if the situation is reversed. Certainly, a left turn was totally unjustified. It is difficult to see how application of Rule 18 under these conditions would have anything but a positive effect upon safety.

Two cases are cited in support of the position that the meeting and passing rules do not apply in fog. Borchich v. Ancich, 191 F. 2d 392 (9th Cir. 1951); The George F. Randolph, 200 Fed. 96 (S. D. N. Y. 1912). Both are distinguishable from the instant case. In the former, fog made the burdened vessel unable to determine that there was another vessel to starboard and in the latter, both vessels were uncertain of each other's location in the fog. Here, the Weyerhaeuser knew the location and course of the Pacific when she was almost three miles away. The court must conclude that the WEYERHAEUSER should have turned right instead of left, and that her failure to do so is a

statutory violation. She was unable to prove that her fault could not have contributed to the collision, and under the Pennsylvania rule, she is again liable.

The Pacific

Libelant asserts that the PACIFIC was proceeding at an "immoderate" rate of speed in violation of Rule 16.[4] Respondent alleges that the PACIFIC was moving at Slow Ahead and that her headway was practically stopped when the WEYERHAEUSER struck her. The testimony from those aboard the PACIFIC is inconsistent and contradictory. The tendency of officers and crew to "stick by the ship" in such matters is well known. The Silver Palm, supra. The PACIFIC's logs are grossly inadequate. The absence of log entries tends to discredit the testimony of witnesses from the vessel on disputed issues. Arkansan-Knoxville City, 1939 A. M. C. 353 (S. D. Cal.)

Second Assistant Engineer Martin of the PACIFIC recorded the orders that he received immediately prior to the collision in his personal notebook and in the engine room log. The notebook relates, ". . . 5:30 P M . . . Heavy Fog—Whistle Operating—Martin on Throttles—Engines Full Ahead—Received 'Slow' port and starboard followed by immediate Full Astern . . . About 10 seconds later felt impact from bow . . . Time from Slow Ahead to Full Astern not over 5

[4] 33 U. S. C. 145n.

seconds." These observations were recorded shortly after the collision, were later confirmed by Martin (although loyalty induced him to attempt to moderate their impact at the trial) and have not been shown to be influenced by considerations reflecting upon their credibility. In the event of conflict between deck officers and engine room personnel as to a vessel's speed changes, the testimony and records of the latter are entitled to greater credence because they have better means of knowledge. Beverly v. Brinton, 1934 A. M. C. 316 (S. D. N. Y. 1915). Upon the presumptions created by the absence or alteration of log entries and the unconscious or reluctant admissions against the ship, many cases must be decided. The Ernest H. Meyer, 84 F. 2d 496 (9th Cir. 1936). The court finds that the PACIFIC was proceeding at her Full speed of 7 knots prior to the collision.

Captain Albee testified that in his opinion the PACIFIC could come to a stop from Full Ahead in three lengths of the vessel, or approximately 540 feet. The most generous estimates of visibility at the time in question placed it at 375 feet. It is clear that the PACIFIC was not proceeding within the "moderate" speed required by statute, since she was not able to stop within one-half the range of visibility, or 188 feet. The Silver Palm, supra. The record substantiates this conclusion and indicates that had the PACIFIC been able to stop in her share of the range of visibility the collision

might have been avoided. Respondent was unable to overcome the presumption of contributory fault arising from the PACIFIC's violation of Rule 16. The Pennsylvania, supra.

Respondent contends that the PACIFIC's faults, if any, were committed in extremis and may be excused. But the nature of an error in extremis is that it is committed when collision is imminent and there is no opportunity to exercise proper judgment. The Chinook, 34 F. 2d 614 (2d Cir. 1929). There are no hard or fast rules to apply, but the error of the PACIFIC was clearly not committed in extremis. Captain Albee admits turning the PACIFIC sharply to starboard five minutes before the collision and the preponderance of evidence shows that the PACIFIC then proceeded at "immoderate" speed on her new course. Evidently Albee's intention was to remove the PACIFIC from the danger area as quickly as possible in whatever time remained. Albee may have been unfortunate but the court cannot avoid the conclusion that prudent seamanship would have been a satisfactory cure.

The International Rules require that a vessel hearing the fog signal of another vessel, the position of which is not ascertained, shall stop her engines and then navigate with caution until the danger is past.[5] The record discloses that neither vessel stopped her engines upon

[5]33 U. S. C. 145n.

first hearing the fog signal of the other, but that at the time, each had the other's position located on her radar screen. The court is of the opinion that "ascertainment" of a vessel's position by radar is adequate justification for failure to comply with the technical requirement that engines be stopped.

In view of the foregoing it is the finding of this court that the collision was caused by the mutual fault of the WEYERHAEUSER and the PACIFIC.

Libelant and cross-respondent Weyerhaeuser Steamship Company and respondent and cross-libelant United States of America are each entitled to recover from the other one-half of all provable damages and court costs sustained as a result of this collision according to the settled admiralty law in cases of mutual fault collisions.

In accordance with the foregoing, if the parties cannot agree on the amount of damages, the matter shall be referred to a special commissioner to take evidence upon the amount of damages sustained by each party and to calculate the net balance payable as between the Weyerhaeuser Steamship Company and the United States of America.

It Is So Ordered.

Date: July 2nd 1959.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed July 2, 1959.

[Title of District Court and Cause.]

Graham James & Rolph, 310 Sansome Street, San Francisco, 4. Proctors for Libelant and Cross-Respondent Weyerhaeuser.

Derby Cook, Quinby & Tweedt, 1000 Merchants Exchange Building, San Francisco 4 Proctors for Intervening Libelant.

Lynn J. Gillard, United States Attorney; Keith R. Ferguson, Special Asst. to the Attorney General; John F. Meadows, Attorney, Admiralty and Shipping Section, Department of Justice, Post Office Building, San Francisco 1. Proctors for United States of America.

SUPPLEMENT TO OPINION

Roche, Judge:

The following paragraphs are hereby added to the Memorandum Opinion of this court in the above-entitled matter filed July 2, 1959:

Intervening libelants St. Paul Fire & Marine Insurance Co., Fireman's Fund Insurance Co., and Boston Insurance Co. are entitled to recover from respondent and cross-libelant United States of America all recoverable damages sustained by them and their insured cargo owners as the result of this collision, together with costs.

With respect to Civil action No. 4255 pending in the U. S. District Court for the Western District of Washington entitled Ostrom vs. Weyerhaeuser Steamship

Company, which action involves a claim for personal injuries allegedly sustained by said Ostrom in this collision, if the ascertainment of the amount of recoverable damages as between Weyerhaeuser Steamship Company and the United States is referred to a special commissioner then said special commissioner shall report to this court the amount if any paid by Weyerhaeuser Steamship Company to said Ostrom in compromise of said lawsuit or the satisfaction of final decree therein leaving the question as to whether such an amount is a recoverable item of said Weyerhaeuser Steamship Company's damages herein for decision by this court.

It Is So Ordered.

Date: July 13th, 1959.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Approved as to Form:

GRAHAM JAMES & ROLPH,
/s/ By HENRY R. ROLPH,

DERBY, COOK, QUINBY & TWEEDT,
/s/ By STANLEY J. COOK,

LYNN J. GILLARD,
KEITH R. FERGUSON,
/s/ By JOHN J. MEADOWS.

[Endorsed]: Filed July 13, 1959.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the libelant Weyerhaeuser Steamship Company, a corporation, and respondent United States of America that the sum of Sixteen Thousand Dollars ($16,000.00) is a reasonable amount to be paid by libelant Weyerhaeuser Steamship Company, a corporation, a full settlement of that certain civil action No. 4255 pending in the United States District Court for the Western District of Washington, entitled Reynold E. Ostrom, Plaintiff, vs. Weyerhaeuser Steamship Co., a corporation, Defendant; it being agreed that the reasonableness of the amount of settlement is the only matter stipulated herein, all other defenses and claims of each of the parties hereto being reserved.

Dated this 10th day of November, 1959.

GRAHAM, JAMES & ROLPH,
/s/ By HENRY R. ROLPH,
Proctors for Libelant Weyerhaeuser Steamship Company,

LYNN J. GILLARD,
United States Attorney,
/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General,
/s/ JOHN F. MEADOWS,
Attorney, Department of Justice
Admiralty and Shipping Section,
Proctors for Respondent,
United States of America.

[Endorsed]: Filed Nov. 10, 1959.

[Title of District Court and Cause.]

STIPULATION RE DAMAGES

It Is Stipulated by and between the parties hereto that:

1. The damages sustained by libelant and cross-respondent, Weyerhaeuser Steamship Company proximately resulting from the collision between the U. S. Army Dredge PACIFIC and the Steamship F. E. WEYERHAEUSER on September 8, 1955, amount to the total sum of $27,652.13, which sum does not include that further item of claimed damages described hereinafter under paragraph 4;

2. The damages sustained by respondent and cross-libelant United States proximately resulting from said collision amount to the total sum of $16,949.12;

3. The damages sustained by intervening libelants proximately resulting from said collision are as follows:

a.	St. Paul Fire & Marine Insurance Co.	$19,122.75
b.	Fireman's Fund Insurance Co.	923.85
c.	Boston Insurance Co.	443.54
	Total sum of	$20,490.14

4. Libelant and cross-respondent Weyerhaeuser Steamship Company paid to Reynold E. Ostrom, a Civil Service employee serving as a seaman (a cabin attendant), at the time of the collision, on the U. S. Army Dredge PACIFIC, a public vessel of the United

States, the sum of $16,000.00 in full settlement of the case of Reynold E. Ostrom v. Weyerhaeuser Steamship Company, No. 4255 in the United States District Court for the Western District of Washington, a suit for claimed injuries sustained as a result of the collision between the SS F. E. WEYERHAEUSER and the U. S. Army Dredge PACIFIC on September 8, 1955; a stipulation by and between Weyerhaeuser Steamship Company and the United States has been filed herein prior to said settlement providing as follows:

"That the sum of $16,000.00 is a reasonable amount to be paid by libelant Weyerhaeuser Steamship Company, a corporation, in full settlement of that certain civil action No. 4255 pending in the United States District Court for the Western District of Washington entitled Reynold E. Ostrom, Plaintiff, v. Weyerhaeuser Steamship Company, a corporation, defendant, it being agreed that the reasonableness of the amount of settlement is the only matter stipulated herein, all other defenses and claims of each of the parties hereto being reserved."

5. Said Reynold E. Ostrom was at all times material an employee of the United States within the coverage of the Federal Employees' Compensation Act, Title 5, United States Code § 751, et seq., and accepted and was paid by the United States compensation under said Compensation Act in the amount of $329.01, covering the period October 12, 1955 to and including Novem-

ber 23, 1955, for claimed injuries occurring as a result of the collision between the SS F. E. WEYERHAEUSER and the U.S. Army Dredge PACIFIC on September 8, 1955, while said Reynold E. Ostrom was serving as said Civil Service employee on the PACIFIC.

It Is Further Stipulated by and between libelant and cross-respondent Weyerhaeuser Steamship Company and respondent and cross-libelant United States that the following issues shall be submitted to the Honorable Michael J. Roche for decision:

a. In this case, which has been decided by the Court to be a collision caused by mutual fault, is the United States liable for contribution to Weyerhaeuser Steamship Company on account of the settlement made by Weyerhaeuser Steamship Company to Reynold E. Ostrom, and if so, in what amount?

b. In the computation of damages herein, is the United States entitled to reimbursement for compensation paid Reynold E. Ostrom under the Federal Employees' Compensation Act?

It Is Further Stipulated by and between libelant and cross-respondent Weyerhaeuser Steamship Company and respondent and cross-libelant United States that said parties or either of them, may introduce into evidence in this case in addition to any other evidence relevant to the above issues a copy of Reynold E. Ostrom's compensation file, or relevant portions thereof.

Dated this 5th day of May, 1960.

GRAHAM JAMES & ROLPH.

/s/ By HENRY R. ROLPH,

Proctors for Libelant and Cross-Respondent.

LYNN J. GILLARD,

United States Attorney.

/s/ KEITH R. FERGUSON,

Special Assistant to Attorney General.

/s/ JOHN F. MEADOWS,

Attorney, Admiralty and Shipping Section Department of Justice,

Proctors for Respondent and Cross-Libelant, United States of America

DERBY, COOK, QUINBY & TWEEDT,

/s/ By STANELY J. COOK,

Proctors for Intervening Libelants.

[Endorsed]: Filed May 17, 1960.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DAMAGES

In the above entitled cause an interlocutory decree was made and entered by Memorandum Opinion, filed July 2, 1959, and a Supplement to Opinion filed July 13, 1959, which said opinions constituted the Court's findings, conclusions and interlocutory decree on the merits in this collision case. In and by said findings, conclusions and interlocutory decree, this Court found and concluded that this collision was caused by the mutual fault of both vessels, the F. E. WEYERHAEUSER and the U. S. Army dredge PACIFIC and ordered that damages and costs be equally divided as between libelant and cross-respondent, Weyerhaeuser Steamship Co., as owner of the steamship F. E. WEYERHAEUSER, and respondent and cross-libelant, United States of America, as owner of the U.S. Army dredge PACIFIC, according to the settled admiralty law in cases of mutual fault collisions, and further ordered that intervening libelants recover their provable damages and costs from the United States.

Thereafter the matter of damages was submitted to the Court upon a stipulation as to the facts, and a legal issue raised upon one of the items of damage claimed by libelant and cross-respondent, Weyerhaeuser Steamship Company. This legal issue was briefed, orally argued, documentary evidence offered and admitted thereon, and submitted to this Court for decision.

Upon the written stipulation of the parties, the Court makes the following

Findings of Fact

I.

The physical and detention damages sustained by the two vessels in this collision were as follows:

To the steamship F. E. WEYER—HAEUSER	$27,652.13
To the U. S. Army dredge PACIFIC	$16,949.12

II.

In said collision intervening libelants, as subrogated insurers of cargo on the F. E. WEYERHAEUSER sustained damages consisting of general average payments which they were required to and did make to the owner of the F. E. WEYERHAEUSER, as follows:

St. Paul Fire and Marine Insurance Co.	$19,122.75
Fireman's Fund Insurance Co.	923.85
Boston Insurance Co.	443.54

III.

In and as a result of said collision, one, Reynold E. Ostrom, sustained personal injuries. Said Ostrom was a Civil Service employee of the United States of America then and there serving aboard the PACIFIC and was within the coverage of the Federal Employees' Compensation Act, 5 U.S. Code Section 751 et seq. Under the Federal Employees' Compensation Act, Ostrom became entitled to receive from the United States of America, and did so receive, the sum of $329.01 as statutory compensation. No written assignment was taken by the United States from Ostrom.

Ostrom also filed a separate action against Weyerhaeuser Steamship Company to recover general damages for his said injuries. This action then pending in the United States District Court for the Western District of Washington, Civil Action No. 4255, entitled Reynold E. Ostrom, Plaintiff vs. Weyerhaeuser Steamship Company, a corporation, was settled by Weyerhaeuser paying $16,000.00 to Ostrom, which said settlement was reasonable in amount. From these settlement proceeds, Ostrom has repaid the aforesaid sum of $329.01 to the United States of America, and said figure has no further significance herein.

Upon the foregoing Findings of Fact the Court draws and makes the following

Conclusions of Law

I.

The amount of $16,000 paid by Weyerhaeuser Steamship Company in settlement of the Ostrom claim is an item of damage to be allowed to Weyerhaeuser Steamship Company in settling the balance between libelant and respondent on a divided damages basis.

II.

Intervening libelants are entitled to recover from respondent United States of America their total damages as set forth in Finding No. II, together with their costs and with interest at 4% per annum from date of entry of final decree herein, as provided by the Public Vessels Act, 46 U.S. Code 782.

III.

The amount payable by the United States of America to intervening libelants as above is an item of prov-

able damage to be allowed to the United States of America in settling the balance between libelant and respondent on a divided damages basis.

IV.

The provable and recoverable damages of libelant and respondent are as follows:

Of Weyerhaeuser Steamship Company:

$27,652.13	physical and detention damages of the F. E. WEYERHAEUSER
$16,000.00	paid to Ostrom
$43,652.13	Total provable damages

Of the United States of America:

$16,949.12	physical and detention damages of the PACIFIC
$20,490.14	payable to intervening libelants
$37,439.26	Total provable damages

V.

Since the total provable damages of Weyerhaeuser Steamship Company exceed those of the United States of America by $6,212.87, Weyerhaeuser Steamship Company is entitled to recover one-half of said excess as the affirmative balance on the cross adjustment of the total damages between the parties, or $3,106.44, from the United States of America, plus interest thereon at 4% from entry of final decree as provided by the Public Vessels Act, 46 U. S. Code 782.

VI.

Respondent United States shall recover from libelant Weyerhaeuser Steamship Company one-half of the total taxable costs taxed against respondent in favor of intervening libelants.

VII.

The allowance of costs and interest being within the discretion of the Court, and in accordance with the Memorandum Opinion of July 2, 1959 and the Supplement to Opinion filed July 13, 1959, taxable costs of Weyerhaeuser Steamship Company and the United States of America shall be shared equally between them and, when the same have been taxed, the party having the larger amount of costs is entitled to recover one-half the excess from the other party. No party shall be credited with any interest on any item of damage prior to final decree, and interest thereafter shall be payable as set forth in conclusions II and V, above.

Dated: June 17th, 1960.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Approved as to Form:
LYNN J. GILLARD,
United States Attorney,
/s/ KEITH R. FERGUSON,
Special Asst. to the
Attorney General,
/s/ JOHN F. MEADOWS,
Attorney, Admiralty and Shipping Section
Department of Justice,
DERBY, COOK, QUINBY, TWEEDT,
/s/ By STANLEY J. COOK,
GRAHAM JAMES & ROLPH,
/s/ By HENRY R. ROLPH.

[Endorsed]: Lodged June 13, 1960; Filed June 17, 1960.

In the United States District Court for the Northern District of California, Southern Division

In Admiralty

No. 27359

WEYERHAEUSER STEAMSHIP COMPANY, a corporation,

Libelant,

v.

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Cross-Libelant,

v.

WEYERHAEUSER STEAMSHIP COMPANY, a corporation,

Cross-Respondent.

ST. PAUL FIRE & MARINE INSURANCE CO., a corporation; BOSTON INSURANCE CO., a corporation, and FIREMAN'S FUND INSURANCE CO., a corporation,

Intervening Libelants.

FINAL DECREE

The above entitled cause having been fully tried and decided, and the Court having heretofore made interlocutory Findings of Fact and Conclusions of Law by Memorandum Opinions filed herein, and having thereafter made Findings of Fact and Conclusions of Law as to damages,

Now, Therefore, in accordance with the aforesaid opinions, findings and conclusions,

It is finally Ordered, Adjudged and Decreed as follows:

1. Libelant Weyerhaeuser Steamship Company shall have and recover from respondent United States of America the sum of $3,106.44, together with interest thereon at 4% per annum from date hereof.

2. The costs of libelant Weyerhaeuser Steamship Company being taxed at $313.90, and the costs of respondent United States being taxed at $432.26, the party having the larger amount of such costs, to wit: The United States shall recover one-half the excess thereof, to wit: $59.18, from the other party, to wit: Weyerhaeuser SS Co., and respondent United States shall recover from libelant Weyerhaeuser Steamship Company one-half of the total costs of $66.00, taxed against respondent United States and in favor of intervening libelants.

3. When the costs of said libelant and respondent shall have been taxed, the party having the larger amount of costs shall recover one-half the excess thereof from the other party.

4. Intervening libelant St. Paul Fire and Marine Insurance Company shall have and recover from respondent United States of America the sum of $19,122.75, together with interest thereon at 4% per annum from date hereof, and its costs of suit, taxed at $22.00.

5. Intervening libelant Fireman's Fund Insurance Co. shall have and recover from respondent United States of America the sum of $923.85, together with interest thereon at 4% per annum from date hereof, and its costs of suit, taxed at $22.00.

6. Intervening libelant Boston Insurance Company shall have and recover from respondent United States of America the sum of $443.54, together with interest thereon at 4% per annum from date hereof, and its costs of suit, taxed at $22.00.

Done in open court this 17th day of June 1960.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Approved as to Form:

LYNN J. GILLARD,
United States Attorney.

KEITH R. FERGUSON,
Special Assistant to the
Attorney General.
/s/ By JOHN F. MEADOWS.

DERBY, COOK, QUINBY, TWEEDT,
/s/ By STANLEY J. COOK.

GRAHAM JAMES & ROLPH,
/s/ By HENRY R. ROLPH.

[Endorsed]: Lodged June 6, 1960; Filed June 17, 1960; Entered June 20, 1960.

[Title of District Court and Cause.]

MOTION FOR REHEARING

To the Honorable Judge of the Above-Entitled Court Sitting in Admiralty:

Respondent and cross-libelant United States moves the Court for a rehearing and to alter and amend the Conclusions of Law and Final Decree in connection with the decision of this Court rendered on June 1, 1960 requiring contribution from the United States to libelant and cross-respondent Weyerhaeuser Steamship Company toward the settlement made by Weyerhaeuser of the suit entitled Reynold E. Ostrom v. Weyerhaeuser Steamship Company in the U. S. District Court for the Western District of Washington, Civil No. 4255. This motion is limited to the Ostrom matter and is grounded upon what the United States considers to be manifest error by the Court in its Conclusions of Law and Final Decree in that the Conclusions of Law, based on the facts as found by the Court, and the Final Decree as to the Ostrom issue are in conflict with the provisions of the Federal Employees' Compensation Act, with the decisions of the courts both in civil and admiralty cases, and with the principles of admiralty law as established and settled by the U. S. Supreme Court and lower Federal courts.

Grounds for This Motion for Rehearing

First: That the Conclusions of Law and Final Decree are in violation of the express statutory provisions of §757(b), Title 5, United States Code, the Federal Employees' Compensation Act, which section

precludes liability of the United States, outside of statutory compensation, under any Federal tort liability statute on account of injuries to a Civil Service employee and thereby prohibits contribution to third parties such as Weyerhaeuser Steamship Company.

Second: That the Conclusions of Law and Final Decree are in violation of §757(b), Title 5, United States Code, and contrary to the applicable decisions of the Supreme Court of the United States, the various Federal Courts of Appeal and District Courts in that by said Conclusions of Law and Final Decree the United States is held to be a joint tort-feasor with Weyerhaeuser as to an injured Civil Service employee to whom, because of the Federal Employees' Compensation Act, there could be no common liability on the part of the United States to respond in damages for tort.

Discussion and Argument

I.

§757(b), Title 5 United States Code, the Federal Employees' Compensation Act, states where material as follows:

"The liability of the United States * * * with respect to the injury * * * of an employee shall be exclusive and in place of all other liability of the United States * * * to the employee, his legal representative * * * and anyone otherwise entitled to recover damages from the United States * * * on account of such injury * * *, in any direct judicial proceedings in a civil action or in admiralty, whether administrative or judicial, under any other workman's compensation law or under any Federal tort liability statute * * *."

Under the terms of this section the liability of the United States under the Compensation Act is exclusive, whether the claim against the United States is made by the injured employee or by third parties seeking contribution from the United States as a joint tortfeasor for payments they made to the employee on account of his injuries. That third parties who have paid an employee for injuries compensable under this and the other Federal Compensation statute (the federal Longshoremen's and Harbor Workers' Compensation Act, §§901, et seq. Title 33 U. S. C.) are precluded by these Compensation Acts from collecting any part of the payment from the employer has been held both in civil and in admiralty cases. American Mutual Ins. Co. v. Matthews, 182 F. 2d 322 (2d Cir. 1950), Christie v. Powder Power Tool Corp., 124 F. Supp. 693 (D. C. 1954), Brown & Root v. U. S., 92 F. Supp. 257 (S. D. Tex. 1950), affirmed 198 F. 2d 138 (5th Cir. 1952), Lo Bue v. U. S., 188 F. 2d 800 (2d Cir. 1951), Crawford v. P&T, Inc., 206 F. 2d 784 (3d Cir. 1953), and Johnson v. U. S., 79 F. Supp. 448 (D. Ore. 1948), to cite a few of the many decisions. In this regard, the court in the case of Standard Wholesale Phosphate & Acid Works, Inc. v. Rukert Terminal Corp. (1949), 193 Md. 20, 65 A. 2d 304, stated:

"The employer's conformance with the statute, by providing compensation in all cases regardless of fault, prevents recovery against him on the ground of negligence. The statute declares his liability for compensation to be exclusive. If it should be construed to preserve his liability, for the payment of a sum measured in whole or in part by the damages sustained by

the employee, merely because the negligence of a third party concurred, or is claimed to have concurred, with his own in producing the injury, his liability for compensation would not be exclusive. It is probable that his liability would in most cases exceed the limits set up in the statute. We think it is immaterial whether his liability to a joint tort feasor stems from a statutory right to contribution or from general principles of the admiralty law. In either event it is essentially a liablity to pay, or share in the payment of, damages for the injury to his employee, of which the statute relieves him. We think the appellant falls squarely within the definition of 'anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury.' It follows that his right to indemnity or contribution is foreclosed by the Act, and hence the employer cannot be impleaded." (Italics supplied.)

The Supreme Court of the United States held that there could be no contribution against the employer under the Federal Longshoremen's and Harbor Workers' Act in Halcyon v. Haenn Ship Ceiling & Refitting Corp., 342 U. S. 282, and the New York Court of Appeals in Cardinal v. State of New York, 304 N. Y. 400, 413, 107 N. E. 2d 569, 575, 1952 A. M. C. 1874, 1883 summarized the Halcyon holding as follows:

"The Supreme Court held in Halcyon Lines vs. Haenn Ship Ceiling & Refitting Corp., substantially this: that, while substantive maritime law has usually decreed contribution as between joint tortfeasors, see Erie R. R. Co. v. Erie & Western Transportation Co., supra; The Ira M. Hedges, supra; The Wonder (2 Cir.), supra;

Barbarino v. Stanhope S. S. Co. (2 Cir.), supra,[1] [per] Learned Hand, J.: and the Green and Severn decisions in these very cases, supra, nevertheless, such contribution should not be enforced against an employer joint tortfeasor, where the injury was to one of his employees who was entitled to compensation under the Federal Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. Code, sec. 901 et seq. As we read the cases, Halcyon is the first one containing an authoritative holding, at least by the highest court, that the ordinary maritime law system of contribution between joint tortfeasors was not available in such a situation (there was a holding against such contribution in the Second Circuit, in 1950, in American Mutual Liability Ins. Co. vs. Matthews, supra, long after the settlement here, but even then, as the Circuit Court noted, the majority of the lower court decisions were the other way, as was, it seems, the Second Circuit's own earlier case of Rich vs. United States, 1949 A. M. C. 2079, 177 F. (2d) 688)." (Footnote added.)

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[1]Two of the cases cited (Erie R.R. Co. v. Erie & Western Transp. Co., 204 U.S. 220, and The Ira M. Hedges, 218 U.S. 264) are mutual fault collision decisions. The Wonder, 79 F. 2d 312 (2d Cir. 1935) concerned a ship's propeller being fouled by a cable and contribution was required. In Barbarino v. Stanhope, 151 F. 2d 553 (2d Cir. 1945), contribution between a shipowner and a stevedore firm was involved (no Compensation Act was concerned evidently), and the Court stated: "* * * the suit is in admiralty, where contribution between joint tort-feasors has existed since 1875. The Alabama, 92 U.S. 695.)" (Page 555.) The Alabama incidentally is a mutual fault collision case.

The Findings of Fact on the Ostrom issue show that Ostrom was a Civil Service employee within the coverage of the Federal Employees' Compensation Act and was paid compensation under that Act for his injuries stemming from the collision. Further, the Findings show that Weyerhaeuser's settlement with Ostrom was for the same injuries. (Finding of Fact III.) Conclusion of Law I stating "The amount of $16,000 paid by Weyerhaeuser Steamship Company in settlement of the Ostrom claim is an item of damage to be allowed to Weyerhaeuser Steamship Company in settling the balance between libelant and respondent on a divided damages basis," is in error and consequently Conclusions of Law IV and V and the Final Decree are in error. By these Conclusions and Decree the Court has erroneously held that §757(b) of Title 5, U. S. C. does not preclude liability of the United States additional to the compensation provided by the Federal Employees' Compensation Act, or, in other words, that §757(b) does not preclude an action for contribution against the employer.

Even Weyerhaeuser Steamship Company did not argue that the wording of § 757(b) failed to preclude third party recovery from the United States. Instead, Weyerhaeuser argued—its main point, as best can be determined from its Brief—as follows:

"It is now evidently the Government's position, subsequent to the determination of mutual fault by this Court, that the long established admiralty rule should not be applied in this case against the United States, advancing the argument that it should be immune as Congress has provided an exclusive system of compen-

sation for personal injuries to its employees under the Federal Employees' Compensation Act.

"For the reasons hereinafter mentioned it is submitted that the payment made to a governmental employee injured in and as a result of this collision should be included as part of the collision damages of the Weyerhaeuser Steamship Company, because by enactment of the Public Vessels Act (Title 46, U. S. C. 781) the Government has assumed the liabilities that are imposed on private litigants under admiralty principles."

Weyerhaeuser then states that since private shipowners have to contribute to personal injury payments in collision cases, the United States should, too. (Weyerhaeuser's Brief filed herein May 13, 1960, on Page 6, line 23 to line 7, page 7; see also Page 7, line 20 to line 4, Page 8; Page 11, lines 6-31; and Page 5, lines 10-24.) Thus, since it is evidently admitted by Weyerhaeuser (as it would have to be in view of the wording of § 757(b) and the authorities above-mentioned) that § 757(b) does cover actions against the United States by third parties, Weyerhaeuser's contention is simply that the phrase in § 757(b): "* * * any Federal tort liability statute" must be interpreted as not including the Public Vessels Act.

If the Court accepted this argument and it is the basis for the ruling that § 757(b) does not preclude contribution here, then this, too, is clearly erroneous, inasmuch as § 757(b) precludes liability of the United States "under any Federal tort liability statute." The statutes governing remedies against the United States (as do both the Public Vessels Act and the Federal

Employees' Compensation Act) must be fitted "as intelligently and fairly as possible into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." Johansen v. U. S., 343 U. S. 427 (1952). An interpretation of the Public Vessels Act as excluding Federal Employees' Compensation Act ignores this principle of statutory interpretation. Further, an interpretation that § 757(b) cannot be a defense because the Public Vessels Act puts the United States in the position of a private litigant cannot stand. As between private parties situated as the parties are here, no recovery of contribution could be had in the face of a governing statute like § 757(b). Similar statutes actually do govern and bar liability for contribution between private parties, as exemplified by State Workmen's Compensation laws and the Federal Longshoremen's and Harbor Workers' Act which also provide for the exclusive liability thereunder of private employers who are covered. See Peak Drilling Co. v. Halliburton Oil Well Cement Co., 215 F. 2d 368 (10th Cir. 1954) (Oklahoma Workmen's Compensation Law), Amer. Dist. Tel. Co. v. Kittleson, 179 F. 2d 946 (8th Cir. 1950) (Iowa Compensation Act), and 2 Larson, Workmen's Compensation Law, Page 230.

It is respectfully submitted that the Court has committed error in concluding that Weyerhaeuser is entitled to contribution toward the Ostrom settlement, whether the basis for the Court's conclusion is that § 757(b) does not cover contribution by its very terms or, as Weyerhaeuser contended, that the Public Vessels Act is an exception to that section.

II.

By its Conclusions of Law I, IV, and V and the Final Decree herein the Court has placed itself in error on a further ground, having thereby concluded that the United States is a joint tort-feasor as to Ostrom. This is implicit in the Court's Conclusions because, as to third party claims, the principle of contribution between ships involved in a collision found to have been caused by mutual fault is the same principle obtaining generally in civil and admiralty cases. This principle requires joint tortfeasance as to damaged third parties before there can be contribution.

As to contribution in admiralty, see the quotations from Cardinal v. State of N. Y., supra, and American Mutual Liability Insurance Co. v. Matthews at Page 11 of the Answering Brief of the United States filed herein May 27, 1960. As to contribution on the civil side, see Brown & Root v. U. S., 92 F. Supp. 257, 261 [S. D. Tex., 1950], affirmed 198 F. 2d 138 [5th Cir. 1952]. Both the admiralty side and the civil side require joint tortfeasance and therefore common liability as to the injured third party on the part of both the party seeking contribution and the one from whom it is sought. There is thus no difference in admiralty and at law in the application of the principle of contribution. That a collision is involved certainly makes no difference, for liability to contribute in a mutual fault collision case "originates in the law of torts as applied by the maritime law." The Cockatoo, 61 F. 2d 889, 891 [2d Cir., 1932]. See also Rich v. U. S., 177 F. 2d 688, 691 [2d Cir. 1949], where the court stated, referring to the claims of cargo owners in mutual fault collision cases:

"Nor do we now find it necessary to decide whether the rule established in The Chattahoochee, 173 U. S. 540, * * * pertaining to collision cases involving § 3 of the Harter Act, 46 U. S. C. §§ 190, et seq., and permitting contribution, should be followed here."

The Findings of Fact and Conclusions of Law on the damages herein treat the cargo claim against the United States and the Ostrom settlement by Weyerhaeuser in the same manner, thus recognizing that both depend on whether or not there is a right to contribution. (It has already been shown that the Federal Employees' Compensation Act does not permit contribution; The Harter Act was interpreted in The Chattahoochee, 173 U. S. 540, 555 [1899], differently. See Amer. Mut. Insurance Co. v. Matthews, 182 F. 2d 322, 324 [2d Cir. 1950]: "The Harter Act was not intended to affect the liability of one vessel to the other in a collision case; 'the relations of the two colliding vessels * * * remain unaffected by this act,'" citing The Chattahoochee.)

The United States cannot, however, be a joint tortfeasor as to Ostrom. Under the compensation statutes, as stated in 2 Larson, Workmen's Compensation Law, at Page 230, § 76.21:

"* * * the employer is not jointly liable (along with a third party also causing the injury) to the employee in tort; the liability that rests upon the employer (under the Workmen's Compensation acts) is an absolute liability irrespective of negligence, and this is the only kind of liability that can devolve upon him whether he is negligent or not. The claim of the employee against the employer is solely for statutory benefits;

his claim against the third person is for damagss. The two are different in kind and cannot result in a common liability." (Matter in brackets supplied.)

(See also Amer. Mut. Liability Ins. Co. v. Matthews, 182 F. 2d 322, 323 [2d Cir. 1950].) In other words, the Compensation Acts substitute an absolute duty to pay the employee compensation upon injury for the common law duty to respond in damages only if negligent.

It is respectfully submitted that the Court has committed error in this second particular, as well as in the first set forth above. Conclusions of Law I, IV, and V and the Final Decree should be altered and amended to show that Weyerhaeuser Steamship Company is not entitled to claim the amount of the Ostrom settlement as an item of recoverable damage and thereby secure contribution from the United States, Ostrom's employer, to that settlement for injuries covered by the Federal Employees' Compensation Act.

LAURENCE E. DAYTON
United States Attorney.

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General.

/s/ JOHN F. MEADOWS,
Attorney, Admiralty and Shipping Section Department of Justice.

Proctors for Respondent and Cross-Libelant, United States of America.

[Endorsed]: Filed June 27, 1960.

[Title of District Court and Cause.]

RESPONDENT AND CROSS-LIBELANT'S SUGGESTION OF ERROR IN THE OPINION OF THIS COURT IN ITS APPLICATION OF RADAR LOCATION AS "VISIBLE" AND "ASCERTAINMENT" WITHIN THE MEANING OF RULES 18 AND 16 OF THE INTERNATIONAL RULES OF THE ROAD

As certain conclusions of the Court are directly in conflict with the new regulations for preventing collisions at sea as set forth in the official International Rules adopted by the London Safety at Sea Convention, 1960 (see Part C, Page 11; Rule 16, Page 13; Annex, (3) Page 18; Part D, (4) Page 13; Rule 18, Page 13. See also Annex 5(c), 6 and 7, Page 18 of Exhibit "A" attached hereto), this Court is respectfully requested to reconsider the following conclusions in its Opinion:

At Page 666 of 174 F. Supp.:

"Rule 18 provides that when two vessels are meeting end on, or nearly so, each shall alter course to starboard so as to effect a port-to-port passing. (33 U. S. C. 146b.)

"* * * Rule 18, written before the advent of radar as an aid to navigation, specifically refers to instances in which the vessels or their lights are visible to each other. This court can see no reason why its applica-

tion should not extend to a situation in which two vessels 'see' each other by radar."

At Page 668 of 174 F. Supp.:

"The International Rules require that a vessel hearing the fog signal of another vessel, the position of which is not ascertained, shall stop her engines and then navigate with caution until the danger is past. (33 U. S. C. 145n.) The record discloses that neither vessel stopped her engines upon first hearing the fog signal of the other; but at the time, each had the other's position located on her radar screen. The court is of the opinion that 'ascertainment of a vessel's position by radar is adequate justification for failure to comply with the technical requirement that engines be stopped."

In order that the Court may understand the feeling of the shipping industry that the conclusions of the Court as above set forth are the first judicial holding that the use of radar has altered the application of navigation rules for vessels proceeding in fog and that this Court has, by its decision held (contrary to the international position) that having radar on board relieves a master from strict observation of the International Rules of the Road, particularly those concerning traveling in fog, a copy of the article printed in the New York Times on September 27, 1959 at Page S-17 is attached hereto marked Exhibit "B".

These suggestions for reconsideration are presented to the Court in order that it may have before it the

official International Rules adopted by the London Safety at Sea Convention, 1960 (Exhibit "A") and the interpretation given by the shipping industry of the effect of the conclusions of this Court (Exhibit "B")

Respectfully submitted,

LAURENCE E. DAYTON,
United States Attorney.

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General.

/s/ JOHN F. MEADOWS,
Attorney, Admiralty and Shipping Section, Department of Justice.

Proctors for Respondent and Cross-Libelant, United States of America

[Endorsed]: Filed July 12, 1960.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR REHEARING

This matter coming on to be heard on the motion of respondent and cross-libelant for rehearing; after full argument by the parties, the Court being fully advised in the premises and upon due consideration thereof, it is

Ordered that the Motion for Rehearing be and the same is hereby denied.

Dated this 14th day of July, 1960.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed July 14, 1960.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Weyerhaeuser Steamship Company, Libelant and Cross-Respondent herein, and Messrs. Graham, Jones & Rolph and Henry R. Rolph, Esq., its proctors. To: St. Paul Fire and Marine Insurance Company, Fireman's Fund Insurance Co., and Boston Insurance Company, Intervening Libelants, and Messrs. Derby, Cook, Quinby & Tweedt and Stanley J. Cook, Esq., their proctors.

Please Take Notice, and notice is hereby given that the United States of America, Respondent and Cross-Libelant in the above-entitled cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Decree signed by Michael J. Roche, United States District Judge in the above-entitled cause, dated June 17, 1960 and entered in the above-entitled Court on June 20, 1960, and from each and every part of said Decree.

Dated: September 9, 1960.

LAURENCE E. DAYTON,
United States Attorney.

s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General.

s/ JOHN F. MEADOWS,
Attorney, Admiralty and Shipping Section, Department of Justice.

Proctors for Respondent and Cross-Libelant, United States of America.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Sept. 9, 1960.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING ACTION IN COURT OF APPEALS

This matter coming on to be heard ex parte this day upon motion of respondent and cross-libelant United States of America by its proctors Laurence E. Dayton, United States Attorney and Keith R. Ferguson, Special Assistant to the Attorney General, by Jerry W. Mitchell, Attorney, Admiralty and Shipping Section, Department of Justice, for an order extending the time for the filing of the Record on Appeal and docketing this action in the Court of Appeals to enable the large record in this case to be prepared and filed in the Court of Appeals, and the Court being fully advised in the premises, it is

Ordered that the time for filing the Record on Appeal and docketing the action in the Court of Appeals in this case be and it is hereby extended to ninety days from the first date of the filing of the Notice of Appeal of respondent and cross-libelant United States of America.

Dated this 12th day of October, 1960.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Approved As To Form:

GRAHAM, JAMES & ROLPH,
/s/ By HENRY R. ROLPH,
Proctors for Libelant and Cross-respondent, Weyerhaeuser Steamship Company.

DERBY, COOK, QUINBY & TWEEDT,
/s/ By STANLEY J. COOK,
Proctors for Intervening Libelants.

[Endorsed]: Filed Oct. 12, 1960.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

Respondent and Cross-Libelant United States, appellant herein, intends on its appeal in the above-entitled cause to rely on the following points:

I.

The District Court erred in holding that the United States must contribute to the payment of any amount paid to the Government's employee in settlement of the latter's claim against Weyerhaeuser Steamship Company.

II.

The District Court erred in holding that ascertainment of another vessel's position by radar is a sufficient justification for failure to stop engines upon hearing the fog signal of an approaching vessel when navigating under conditions of restricted visibility as required by Rule 16 of the International Rules for Navigation at Sea (33 United States Code 145(n)(b)).

Dated this 5th day of December, 1960.

LAURENCE E. DAYTON,
United States Attorney.

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General.

/s/ JOHN F. MEADOWS,
Attorney, Admiralty and Shipping Section, Department of Justice.

Proctors for Respondent and Cross-Libelant, United States of America.

Receipt of Copy attached.

[Endorsed]: Filed Dec. 6, 1960.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

Please include the following on the Record on Appeal:

Docket Numbers

Docket Entries

1. Libel in Personam filed July 18, 1956.
14. Answer to Libel filed July 3, 1957.
15. Cross-Libel filed July 3, 1957.

17. Libel in Intervention of St. Paul Fire & Marine Insurance Co. filed July 30, 1957.

20. Answer of United States to Libel in Intervention, filed October 29, 1957.

21. Answer to Cross-Libel filed October 20, 1957.

26. Consent to Amendment of Libel filed April 22, 1958.

41. Stipulation and Order for Amendment to Cross Libel filed October 8, 1958.

42. Further amendment to Cross-Libel filed October 8, 1958.

61. Memorandum Opinion, dated July 2, 1959.

69. Supplement to Opinion, dated July 13, 1959.

73. Stipulation re reasonableness of Weyerhaeuser's settlement with Ostrom filed November 10, 1959.

76. Stipulation re Damages filed May 17, 1960.

79. Findings of Fact and Conclusions of Law on Damages filed June 17, 1960.

80. Final Decree entered June 20, 1960.

82. Motion for Rehearing, no Points & Authorities filed by Government June 27, 1960.

87. Suggestion of Error filed July 12, 1960. (Excluding Exhibits Thereto.)

88. Order Denying Motion for Rehearing entered July 14, 1960.

89. Notice of Appeal by Respondent United States filed September 9, 1960.

91. Order Extending Time for Filing Record on Appeal and Docketing Action in Court of Appeals entered October 12, 1960.

This Designation.

Statement of Points To Be Relied Upon On Appeal, to be filed concurrently with this Designation.

Dated this 5th day of December, 1960.

LAURENCE E. DAYTON,
United States Attorney.

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General.

/s/ JOHN F. MEADOWS,
Attorney, Admiralty and Shipping Section, Department of Justice.

Proctors for Respondent and Cross-Libelant, United States of America.

Receipt of Copy.

[Endorsed]: Filed Dec. 6, 1960.

[Title of District Court and Cause.]

COUNTER DESIGNATION OF RECORD ON APPEAL SUBMITTED BY WEYERHAEUSER STEAMSHIP COMPANY (LIBELANT, CROSS-RESPONDENT AND APPELLEE)

To the Clerk of the Above-Entitled Court:

Please include the following in the Record on Appeal in addition to the documents already designated by the United States of America (Respondent, Cross-Libelant and Appellant):

Docket Numbers	Docket Entries
27.	Ancillary Petition for Injunction and Temporary Restraining Order filed by the United States of America on April 22, 1958.
28	Temporary Restraining Order and Order to Show Cause filed April 22, 1958.
29.	Memorandum of Points and Authorities in Support of Ancillary Petition for Injunction and Temporary Restraining Order filed April 24, 1958.
31.	Order for Writ of Injunction filed April 28, 1958.
32.	Writ of Injunction Served filed April 30, 1960.

This Counter Designation.

It is further requested that the following listed item numbers be included in the record on appeal from the libelant's exhibit which was introduced at the oral argu-

ment of June 1, 1960 at which Judge Michael J. Roche ordered judgment for libelant and against the United States, which exhibit consisted of the certified copy of the Clerk's record in the case of Reynold E. Ostrom, plaintiff, v. Weyerhaeuser Steamship Company, a corporation, from the records of the United States District Court, Western District of Washington, Northern Division, No. 4255.

Item No. 9. Special Appearance of United States of America filed February 14, 1957.

Item No. 11. Order of Court Denying Motion to Bring in Third Party Defendant filed February 20, 1957.

Item No. 33. Motion for Reconsideration of Court's Order Dismissing Third Party Complaint filed March 26, 1958.

Item No. 40. Affidavit of Graydon S. Staring (Attorney in the Admiralty and Shipping Section, Department of Justice, U. S. Attorney's Office, San Francisco, California) filed April 18, 1958.

Item No. 41. Memorandum of the United States of America in Opposition to Defendant's Motion for Reconsideration of Order Denying Leave to Bring in Third Party Defendant filed April 18, 1958.

Item No. 50. Notice of Injunction Against Filing or Prosecution of Third Party Complaint filed April 30, 1958.

Item No. 53. Memorandum of Points and Authorities in Support of Motion to Reconsider filed May 7, 1958.

Item No. 58. Motion for Special Setting filed by

defendant Weyerhaeuser Steamship Company on September 3, 1958.

Item No. 60. Order Staying Setting Case filed September 29, 1958.

Dated: December 15, 1960.

/s/ GRAHAM JAMES ROLPH,
/s/ HENRY R. ROLPH,
Proctors for Weyerhaeuser
Steamship Company.

Receipt of Copy attached.

[Endorsed] Filed Dec. 15, 1960.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above entitled case and that they constitute the record on appeal herein as designated by the Proctors for the Appellant:

Libel

Answer of respondent United States

Cross-Libel of United States

Libel in intervention of St. Paul Fire & Marine Ins. Co. and Fireman's Fund Insurance Co.

Answer of United States to libel in intervention

Answer of Weyerhaeuser Steamship Co. to cross-libel of United States

Consent to amendment of libel

Stipulation for amendment to cross-libel

Amendment to cross-libel

Memorandum Opinion

Supplemental Opinion

Stipulation re reasonableness of Weyerhaeuser's settlement with Ostrom

Stipulation re damages

Findings of Fact and Conclusions of Law on Damages

Final Decree

Motion for rehearing

Suggestion of error

Order denying motion for rehearing

Notice of appeal

Order extending time for filing record on appeal

Statement of points to be relied upon on appeal

Designation of Record on appeal

Docket Entries

Libelant's exhibits 1 thru 5, 5A to 5C, and 6 thru 13, inclusive Respondent's exhibits A thru Z and A-A to A-X, inclusive.

———Volumes of Reporter's transcript.

In Witness Whereof, I Have Hereunto Affixed the Seal of the Above Entitled Court This 6th Day of December, 1960.

C. W. CALBREATH, Clerk.

/s/ By WILLIAM C. ROBB,

Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the N rthern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above entitled case and that they constitute the supplemental record on appeal as counter-designated by the Proctors for the Appellee:

Memo of Points & Authorities in Support Thereof, and

Ancillary petition for injunction and temporary restraining order

Temporary restraining order and order to show cause

Order for Writ of Injunction

Writ of Injunction

Counter Designation of record on Appeal

In Witness Whereof, I have Hereunto Affixed the Seal of the Above Entitled Court this 19th Day of December, 1960.

C. W. CALBREATH, Clerk.
/s/ By WM. C. ROBB,
Deputy Clerk.

Received the above this
19th Day of December, 1960.

[Endorsed]: Filed Dec. 19, 1960. Frank H. Schmid, U.S.C.A. Clerk.

LIBELANT'S EXHIBIT

[Certified copy of Clerk's Record in the case of Reynold E. Ostrom, Plaintiff, vs. Weyerhaeuser Steamship Co., a corporation, Defendant—United States District Court, Western District of Washington, Northern Division, No. 4255.]

United States District Court Western District of Washington Northern Division

Civil No. 4255

REYNOLD E. OSTROM,

Plaintiff,

v.

WEYERHAEUSER STEAMSHIP CO., a corporation,

Defendant.

WEYERHAEUSER STEAMSHIP CO., a corporation,

Third Party Plaintiff,

v.

UNITED STATES OF AMERICA,

Third Party Defendant.

SPECIAL APPEARANCE

To: Weyerhaeuser Steamship Co., a corporation, Third Party Plaintiff, and

To: Bogle, Bogle & Gates, its attorneys.

You, And Each Of You, Will Please Take Notice that the United States of America, by and through Charles P. Moriarty, United States Attorney, and Wil

liam A. Helsell, Assistant United States Attorney, hereby enters its special appearance for the purpose only of contesting the jurisdiction of this Court over the United States of America in this proceeding, and you will please serve all notices, pleadings and papers in connection with said case upon the attorneys for the United States of America at their address below stated.

s/ CHARLES P. MORIARTY,
United States Attorney

s/ WILLIAM A. HELSELL,
Assistant United States Attorney.

Office and Post Office address:
1012 U. S. Courthouse,
Seattle 4, Washington.

[Endorsed]: Filed Feb. 14, 1957.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO BRING IN THIRD PARTY DEFENDANT

This Matter having come on regularly for hearing upon the motion of the Weyerhaeuser Steamship Co., a corporation, for leave to make the United States of America a party to this action, the Weyerhaeuser Steamship Co., defendant, appearing through Bogle, Bogle & Gates and Edward S. Franklin its attorneys, and the United States of America appearing specially and objecting to the jurisdiction of the court as to the

United States of America, and the Court having listened to the argument of counsel and having considered the Memorandum of Authorities filed herein and having examined the pleadings and it appearing to the Court that if the defendant and proposed third party plaintiff had sought to institute the cause of action alleged by it in its proposed third party complaint independently in this district against the United States of America, the court would have no jurisdiction over the United States of America and over the objections of the United States of America would be unable to compel the United States of America to submit to the Court's jurisdiction; and it appearing further to the Court that if it would have no jurisdiction to compel the United States of America to respond to a direct action of the type which the defendant and proposed third party plaintiff attempts to assert here, it likewise is without jurisdiction or power to compel the United States to submit to this Court's jurisdiction under the impleader provisions of Rule 14 of the Federal Rules of Civil Procedure, and the Court being fully advised in the premises, now, therefore,

It Is Hereby Ordered that the objections of the United States of America, appearing specially, to this Court's jurisdiction are sustained and the motion of the Weyerhaeuser Steamship Co., defendant, for leave to make the United States of America a party to this action be, and the same is hereby, denied.

Done In Open Court this 20th day of February, 1957.

/s/ JOHN C. BOWEN,
United States Distict Judge.

Presented and approved by:

/s/ WILLIAM A. HELSELL,
Assistant United States Attorney.

Approved as to form,

Notice of presentation waived.

/s/ BOGLE, BOGLE & GATES,

/s/ By EDW. S. FRANKLIN,
Attorneys for Defendant,
Weyerhauser Steamship Co.

[Endorsed]: Filed Feb. 20, 1957.

[Title of District Court and Cause.]

MOTION FOR RECONSIDERATION OF COURT'S ORDER DISMISSING THIRD PARTY COMPLAINT

Comes Now defendant Weyerhaeuser Steamship Co., a corporation, and moves this Court to reconsider its prior Order of February 20, 1957, refusing defendant leave to make the United States of America a third-party defendant herein under Rule 14, Federal Rules of Civil Procedure, and that said Order be reversed and leave be given defendant Weyerhaeuser Steamship

Co. to file a third party complaint and/or libel against the United States of America.

This motion is based upon the case of Orion Shipping & Trading Co. v. United States of America, 247 F.(2d) 755, decided by the United States Circuit Court of Appeals on July 25, 1957, the decision in which case authorizes the relief sought by defendant Weyerhaeuser Steamship Co. against the United States of America in this action. Defendant and movant, Weyerhaeuser Steamship Co., a corporation, alleges the Dredge "PACIFIC," which was in collision with the vessel of defendant herein, S.S. "F. E. WEYERHAEUSER," was a public vessel of the United States, and relies upon the Public Vessels' Act, 46 U.S.C. §§781-790, inclusive, and the Suits in Admiralty Act, 46 U.S.C. §§741-752, inclusive.

Defendant further alleges that it maintains an office in Seattle, Washington, and is a resident of this Judicial District under 28 U.S.C.A. 1391 (C).

BOGLE, BOGLE & GATES,
Attorneys for Defendant and
Third Party Plaintiff, Weyerhaeuser
Steamship Co., a corporation.

Receipt of Copy attached.

[Endorsed]: Filed Mar. 26, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF GRAYDON S. STARING

Graydon S. Staring, being first duly sworn upon his oath, deposes and says:

That he is an Attorney in the Admiralty and Shipping Section of the Department of Justice; that he has read defendant's motion herein erroneously entitled "Motion for Reconsideration of Courts Order Dismissing Third Party Complaint" and supporting papers; that he is familiar with the file and proceedings in this cause and that he is familiar with the file and proceedings in the cause of Weyerhaeuser Steamship Co. v. United States of America, Admiralty No. 27359 in the United States District Court for the Northern District of California.

That according to information officially furnished to him the Dredge Pacific is within the territorial waters of the United States and without the Western District of Washington, to wit: in the District of Oregon.

That there has been filed on July 18, 1956, in the United States District Court for the Northern District of California, a certain libel in the case of Weyerhaeuser Steamship Company v. United States of America, Admiralty No. 27359 in which Weyerhaeuser Steamship Company, the defendant above named, seeks to recover from the United States of America, its damages as a result of the collision with the Dredge

Pacific on September 8, 1955 which is the subject of the proposed Third Party Complaint herein; that the libelant in its said libel has elected to proceed in accordance with the principles of libels in rem; that respondent United States of America in the said Admiralty cause has filed its answer and cross-libel; that the said Admiralty cause is being prepared for trial and that the discovery procedures by the United States in the said Admiralty cause are not yet complete nor even substantially complete.

That even if defendant were allowed to file its Third Party Complaint, despite the lack of jurisdiction and venue of such complaint, the United States would be entitled to 60 days to plead in accordance with the rule and would thereafter require full resort to discovery procedures not only against the defendant but against the plaintiff and would not and could not proceed to trial in May 1958 nor for a considerable period of time thereafter.

/s/ GRAYDON S. STARING.

Subscribed and sworn to before me this 15 day of April 1958.

[Seal]

/s/ J. P. WELSH,
Deputy Clerk, U.S. District Court
Northern District of California.

[Endorsed]: Filed April 18, 1958.

United States District Court Western District of Washington Northern Division

Civil No. 4255

REYNOLD E. OSTROM,

Plaintiff,

v.

WEYERHAEUSER STEAMSHIP CO., a corporation,

Defendant.

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION OF ORDER DENYING LEAVE TO BRING IN THIRD PARTY DEFENDANT.

Without any change in the circumstances which required this Court to deny defendant's earlier motion to implead the United States, defendant has now sought to renew that motion on the eve of trial when the impleader sought, even were it within the power of the Court, as it is not, would seriously disrupt not only the conduct of this case but also the conduct of the principal action arising out of this collision now pending in another court.

The United States, appearing specially, opposes the motion to implead it, on the following grounds:

1. The improper venue and lack of jurisdiction which caused the motion originally to be denied;

2. That the controversy sought to be presented is within the exclusive jurisdiction of another Federal court where the collision claims of defendant and the United States are now pending, and that the present

attempt to implead the United States here is an improper attempt to have this Court usurp the jurisdiction of this collision action and render a decision which might then, if favorable to defendant, be asserted as res judicata in the main collision action pending elsewhere; and

3. That the claim that this impleader is timely is not true in fact.

It should be noted here at the outset that, in this improper attempt, counsel for defendant have not only blandly misrepresented the holding in Orion Shipping & Trading Co. v. United States, 247 F. 2d 755, although they participated in that case and know better, but also, apparently to throw dust in the eyes of the Court, they have recaptioned their motion as though the United States were already a party and placed a misleading title in their motion calculated to indicate that a third party complaint had been filed herein and then dismissed, which is not true. The apparent purpose of this dissimulation is to foster the false impression that this case is in a similar procedural posture to Orion, although that, even if it were true, could not properly be turned to account by defendant in this instance.

In addition to the matters which follow, the United States refers to and incorporates here its memorandum filed in opposition to the original motion to implead made by defendant.

The Venue of the Proposed Third Party Complaint Is Still Improperly Laid in This District.

Although the proposed third party complaint does not plead facts showing jurisdiction under any statute, it is plain from the character of this Government dredge and from the affidavit of Raymond G. Sandwick on file herein, that she is a public vessel and that the claim of defendant must therefore be brought under the Public Vessels Act, 46 U. S. C., Section 781 et seq.

The venue provisions of the Public Vessels Act, 46 U. S. C., at Section 782, require that though suit be brought in the "district in which the vessel or cargo charged with creating liability is found within the United States," unless the vessel be outside the territorial waters of the United States. Not only does the defendant not plead facts showing venue but, as the affidavits show, the Dredge Pacific is actually within the territorial waters of the United States and within the District of Oregon, not the Western District of Washington. Accordingly, any new suit at this time, if one were permissible at all, would have to be in the District of Oregon. But, moreover, Weyerhaeuser's suit for its collision damages, which included its claim here presented, has already long been in litigation in the Northern District of California where the matter is completely at issue and pending on the libel of Weyerhaeuser and the cross-libel of the United States. It is unthinkable that the Public Vessels Act would permit suits in two districts at once, and the venue provisions of Section 742 show plainly a purpose that venue in this case be laid in only one district.

In the case of Orion Shipping & Trading Co. v. United States, 247 F. 2d 755, 1957 A. M. C. 2236 (9th Cir.), relied on by defendant, the Court of Appeals, far from supporting defendant's position, upheld this Court's ruling that proper venue must be pleaded and proved in third party complaints as in original complaints. There the applicability of the Orion case ends, since in that case there had been a third party complaint on file which had gone to trial and then been dismissed. The Court of Appeals ordered it transferred to the proper venue under the Act. The other three cases cited by defendant in its Supplemental Memorandum filed April 3, 1958 have no application to this case. They do not deal with the venue defect in this case and would not, in any event, stand against the requirement of Orion that proper venue be shown.

The Orion case is not authority to file without regard to venue as defendants seek to do here and then proceed to transfer. What would be the purpose of such a transfer, which would have to be made to the Northern District of California, where the action is already pending? Plainly, the object of defendant must be to thwart the Public Vessels Act and the Orion case in some manner, and it is highly inferable that they hope by some oversight on the part of the Court or opposing counsel, to litigate the collision liability here as an adjunct of this personal injury jury case, in which they would hope to surprise the Government ill-

prepared, and then to assert any ruling of fault as res judicata in the main collision action pending elsewhere.

The Subject Matter of the Proposed Third Party Complaint Is Already Wtihin the Exclusive Jurisdiction of Another Federal Court.

Defendant Weyerhaeuser has already long since filed its suit against the United States for collision damages in the District Court for the Northern District of California. That suit, on in rem and in personam principles under the Public Vessels Act, has been pending since July 18, 1956. The Government has answered the libel and filed its cross-libel and the suit is at present at the discovery stage. All this is shown by the affidavit of Graydon S. Staring filed herein.

In its suit in the Northern District of California, Weyerhaeuser has asked its collision damages. In that suit for collision damages any amount defendant may be held to pay plaintiff here is fully taken into account as an item of damages. The Albert Dimois, 177 U. S. 240, 44 L. Ed. 751 (1900); Brooklyn Eastern District Terminal v. United States, 54 F. 2d 978, 1932 A.M.C. 108 (2nd Cir.) affirmed 287 U. S. 170. The true subject matter of the proposed third party complaint in the cause of action, if any, of Weyerhaeuser against the United States for collision, of which any award to plaintiff is simply one of the items of damages.

Where, as here, the subject matter is already before another Federal court for determination, though juris-

diction of that court is exclusive, and this court, therefore, may not entertain the proposed third party complaint. French v. Hay, 22 Wall. 250, 22 L. ed. 857 (1875); Ex Parte City Bank of New Orleans, 3 How. 292, 314, 11 L. Ed. 603, 613 (1845) ("Of course, in whichever court such adverse suit should be first brought, that would give such court full jurisdiction thereof to the exclusion of the other.") The first Federal court obtaining jurisdiction of a controvery should be permitted to proceed without interference. See Hull v. Burr, 234 U. S. 712, 725, 58 L. ed. 1557, 1564 (1914). This court's jurisdiction was similarly protected in the case of United States ex rel Skinner & Eddy v. McCarl, 8 F. 2d 1011, 1012 (D. C. Cir. 1925) affirmed 275 U. S. 1.

It is apparent that even if defendant's purpose is not to interfere with the pending collision case, the effect of granting defendant's motion to implead would be to do just that. Moreover, since the collision action is already pending and at issue in another court, it is manifest that no constructive purpose would be served by allowing the proposed impleader, the effect of which would simply be a multiplicity of actions on a single cause of action.

It Is Incorrect That the Filing of the Proposed Third Party Complaint Will Not Delay the Case.

In an affidavit of Edwin J. Friedman, filed in apparent support of defendant's motion to implead the

United States, the affiant baldly states that the granting of the motion to implead should not be used as a basis of continuing the trial date and implies that the United States is ready for trial. The true state of affairs is reflected in the affidavit of Graydon S. Staring filed herein. Mr. Friedman, who is a lawyer, must surely know that, under Rule 12, F.R.C.P. the United States would have 60 days merely to answer the proposed third party complaint and would thereafter be entitled under the rules to discovery procedures against both Weyerhaeuser and Ostrom. Manifestly, a very substantial continuance would be required and insisted upon by the United States. Manifestly, also, defendant's motion is untimely.

Conclusion

For the foregoing reasons it is respectfully submitted that defendant's motion for reconsideration should be denied.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ JACOB A. MIKKELBORG,
Assistant United States Attorney.

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney General.

Attorneys for United States of America.

[Endorsed]: Filed April 18, 1958.

[Title of District Court and Cause.]

NOTICE OF INJUNCTION AGAINST FILING OR PROSECUTION OF THIRD-PARTY COMPLAINT.

To: Clerk of the Above-Entitled Court.

To: Reynold E. Ostrom, plaintiff, and Levinson & Friedman, his attorneys, and

To: Weyerhaeuser Steamship Co., defendant, and Bogle, Bogle & Gates, its attorneys.

You, and Each of You, Will Please Take Notice of the injuncton, a certified copy of which is attached hereto, enjoining defendant Weyerhaeuser Steamship Co. from filing or prosecuting any third-party complaint or action against United States of America herein.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ JACOB A. MIKKELBORG,
Assistant United States Attorney.

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General.

LLOYD H. BURKE
United States Attorney
KEITH R. FERGUSON
Special Assistant to the Attorney General
GRAYDON S. STARING
Attorney, Admiralty and Shipping Section
Department of Justice
JOHN F. MEADOWS
Attorney, Admiralty and Shipping Section
Department of Justice
447-A Post Office Building
San Francisco 1, California
Telephone: MArket 1-2500
Proctors for United States of America

In the United States District Court
for the Northern District of California,
Southern Division
In Admiralty
No. 27359

WEYERHAEUSER STEAMSHIP COMPANY, a corporation,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Cross-Libelant,

vs.

The American Steamship F. E. WEYERHAEUSER, etc., and WEYERHAEUSER STEAMSHIP COMPANY, a corporation,

Cross-Respondent.

ST. PAUL FIRE & MARINE INSURANCE CO., a corporation, and FIREMAN'S FUND INSURANCE CO., a corporation,

Intervening Libelants.

WRIT OF INJUNCTION

The President of the United States of America, to Weyerhaeuser Steamship Company, a corporation of the State of Delaware having an office and place of business at San Francisco, California, and its agents, successors, deputies, servants, employees, attorneys, proctors, and all persons acting by, through, or under them or any of them and to each and every one of you, Greeting:

Whereas, respondent United States of America has heretofore filed an Ancillary Petition for Injunction and Temporary Restraining Order herein in the United States District Court for the Northern District of California against you and each of you for certain relief as therein set forth and has obtained an order and allowance of a permanent injunction as prayed for in the said Ancillary Petition;

Now, Therefore, we having regard to the matters in the said Ancillary Petition contained, do hereby command and strictly enjoin you, the said Weyerhaeuser Steamship Company, your agents, successors, deputies, servants, employees attorneys, proctors, and all persons acting by, through, or under them or any of them and each of you to refrain and desist wholly from filing, instituting, or prosecuting any third-party complaint, action, or proceeding whatever against respondent United States of America in that certain action entitled Ostrom v. Weyerhaeuser Steamship Co., Civil No. 4255

in the United States District Court for the Western District of Washington, which commands and injunctions you are respectively required to observe and obey;

And hereof fail not under penalty of law thence ensuing.

Witness, the Honorable Louis E. Goodman, Judge of said Court, at the City and County of San Francisco, in the Northern District of California, this 28th day of April, 1958.

C. W. CALBREATH,
Clerk.

/s/ By J. P. WELSH,
Deputy Clerk.

A True Copy, Attest
C. W. CALBREATH, Clerk.
By /s/ J. P. WELSH, Deputy Clerk.
[Seal]

[Endorsed]: Filed April 30, 1958.

United States District Court
Western District of Washington
Northern Division

Civil No. 4255

REYNOLD E. OSTROM,

Plaintiff,

vs.

WEYERHAEUSER STEAMSHIP CO., a corporation,

Defendant.

WEYERHAEUSER STEAMSHIP CO., a corporation,

Third Party Plaintiff,

vs.

UNITED STATES OF AMERICA,

Third Party Defendant.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO RECONSIDER.

I

Venue for the Proposed Third Party Complaint Does Not Exist to Permit Suit Against the United States in the Western District of Washington.

That the United States Army Dredge PACIFIC is a public vessel of the United States, has not been controverted by the defendant Weyerhaeuser in this Court, nor is it controverted that said public vessel dredge is not now and has not been at any time material to this action within the boundaries of this, the Western District of Washington, nor upon the high seas beyond the boundaries of any other district. As set forth in the affidavit of Jacob A. Mikkelborg, hereto annexed, said public vessel PACIFIC was on April 21, 1958 and prior thereto and until about May 24, 1958, located and will be located at Portland, within the District of Oregon. Status and location of the public vessel PACIFIC is similarly attested by the annexed affidavit of Raymond G. Sandwick, Chief of Plant Branch, Portland District, United States Army Engineers.

Consequently, the impleader and third party complaint brought by the defendant Weyerhaeuser Steam-

ship Co., a corporation, against the United States of America, must fail for lack of compliance with the essential conditions prerequisite to suit against the United States as imposed by the Congress in the Public Vessels Act at Title 46, U. S. C., Section 782. This section, set forth below, specifies with particularity the requirements for venue of a suit against the United States under the Public Vessels Act, which requirements have not been met, thereby precluding third party suit in this District.

"§ 782 Venue of Suit; application of provisions of Chapter 20. Such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of the parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suit shall be subject to and proceed in accordance with the provisions of chapter 20 of this title or any amendment thereof, insofar as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of rendition of judgment unless upon a contract expressly stipulating for the payment of interest." (Emphasis added.)

Defendant Weyerhaeuser Steamship Co., a corporation, cited to the Court the decision of the Court of Appeals for the Ninth Circuit in Orion vs. United States, 247 F. 2d 755. While this decision by the Court of Appeals allowing the mixing of law and admiralty causes reversed the decision of the trial court on jurisdiction for the third party complaint under the Suits in Admiralty Act, at page 757 it affirmed the decision of this Court as to the requirements of proper venue, holding that because the government cargo was not shown to ever have come into the Western District of Washington, venue of the third party action was in the Southern District of New York where Orion had its principal place of business. Thus, venue would not lie within the Western District of Washington. Furthermore, due to the nature of the Army dredge PACIFIC as a public vessel of the United States which requires the third party complaint to be grounded upon the Public Vessels Act, this distinguishes the instant cause from that in Orion on the facts. While the latter part of Section 782 of the Public Vessels Act adopts the procedure of the Suits in Admiralty Act, it specifies the entirely distinct provision with respect to venue for Public Vessels Act suits emphasized in the quoted section above.

Thus, the United States respectfully submits for the court's consideration that the Court of Appeals decision in Orion v. United States requires rather than prevents a ruling by the Court in favor of the United States to deny the defendant's motion to implead the United States as a third party defendant in the above entitled action, the grounds for said denial necessarily

being the lack of proper venue under the Public Vessels Act.

II

The Subject Matter of the Proposed Third Party Complaint is Already Within the Exclusive Jurisdiction of Another Federal Court.

Suit by the defendant here, Weyerhaeuser Steamship Co., a corporation, has now been pending against the proposed third party defendant United States in the Northern District of California since July 18, 1956. That suit, at issue on libel and cross libel in the cause of the identical collision which gave rise to the instant suit by plaintiff against defendant, has as one of the elements of defendant's damages any amount which defendant may be required to pay plaintiff in the instant suit. That plaintiff's recovery in the instant suit against Weyerhauser in this court is simply one of Weyerhaeuser's items of damage sought from the United States in the California suit is a matter of law. The Albert Dumois, 177 U.S. 240, 44 L. Ed. 751 (1900); Brooklyn Eastern District Terminal v. United States, 54 F. 2d 978, 1932 AMC 108 (2nd Cir.) affirmed 287 U.S. 170.

Thus, the subject matter of the proposed third party complaint was already in litigation in the District Court for the Northern District of California. That Court's jurisdiction, first obtained, is exclusive and defendant should not seek to have this Court entertain the proposed third party complaint and this Court should properly permit the California District Court to proceed without color of interference. French v. Hay, 22 Wall.

250, 22 L. Ed. 857 (1875); Ex Parte City Bank of New Orleans, 3 How. 292, 314, 11 L. Ed. 603, 613 (1845). See also Hull v. Burr, 234 U. S. 712, 725, 58 L. Ed. 1557, 1564 (1914). In United States es rel Skinner & Eddy v. McCarl, 8 F. 2d 1011, 1012 (D.C. Cir. 1925) affirmed at 275 U. S. 1, this court's prior jurisdiction was similarly protected.

The United States respectfully queries what constructive purpose would be served by allowing the defendant's proposed impleader, permitting the reverse of the purpose of third party practice in creating a multiplicity of actions on the collision liability as between the United States and Weyerhaeuser—which liability is already at issue and pending in another Federal Court.

With these considerations in mind the United States in the District Court for the Northern District of California obtained a temporary restraining order and order to show cause directed to defendant Weyerhaeuser Steamship Co., a corporation, restraining said defendant from proceeding with its proposed third party complaint in this District and to appear and show cause why an injunction should not issue against such proceeding. Significantly, the defendant Weyerhaeuser Steamship Co., a corporation, acceded and is now enjoined from filing, instituting or prosecuting any third party complaint action or proceeding whatever against the United States in the instant cause. Thus, the de-

fendant, Weyerhauser Steamship Co., a corporation, does not now oppose this motion for reconsideration of the order entered in this cause on April 21, 1958.

Having set forth the points and authorities in support of the motion to reconsider said Order of April 21, 1958 in this cause, the United States respectfully requests the Court to reconsider and, being more fully advised in the premises, to vacate said order and deny the motion of defendant Weyerhaeuser Steamship Co., a corporation, to bring in the United States as third party defendant in this action between plaintiff Ostrom and said defendant.

Respectfully submitted,

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ KEITH R. FERGUSON,
Special Asst. to the Attorney General.

/s/ JACOB A. MIKKELBORG,
Assistant United States Attorney.

Attorneys for the United States of America.

Copy Received:

[Title of District Court and Cause.]

AFFIDAVIT

United States of America Western District of Washington Northern Division—ss.

Jacob A. Mikkelborg, being first duly sworn, on his oath deposes and states that he is an Assistant United States Attorney and is familiar with the files and records in the captioned cause.

That at the time of the defendant's motion to implead the United States as third party defendant, and subsequently on April 21, 1958 at the time of the defendant's motion to reconsider the Court's order of February 20, 1957, and at all times material to commencement of the proposed Third Party action herein, the United States Army Dredge PACIFIC has been and is now a public vessel of the United States, owned on its behalf by the United States Department of the Army and further, according to information officially furnished him, that said vessel was not and is not now within the Western District of Washington nor on the high seas outside of any judicial district.

Further, that there was since July 18, 1956 and now is and at all times material herein there has been pending a certain libel and shortly thereafter a cross libel between the defendant Weyerhaeuser Steamship Co., a corporation, and the United States of America in the District Court for the Northern District of California, on the issues of liability and damages arising out of collision between said United States public vessel, namely, the Department of the Army Dredge PACIFIC and the defendant's vessel SS "F. E. WEYER-

HAEUSER" on September 8, 1955. The cause of action in the instant case before this Court, between plaintiff Reynold E. Ostrom and defendant Weyerhaeuser Steamship Co., a corporation, also arises from and is an incident of the said collision, the action having been brought as a result of injuries and damages allegedly sustained by plaintiff Ostrom while employed as a crew member on said public vessel, the alleged injuries and damages being claimed to have been incurred as a result of the collision between said public vessel and the defendant's vessel SS "F. E. WEYERHAEUSER".

Because of the pendency of this litigation in California, the United States sought and obtained a temporary restraining order restraining said defendant Weyerhauser Steamship Co., a corporation, from bringing suit against the United States in this District by means of impleader and Third Party Complaint against the United States of America. Further, that said temporary restraining order was succeeded by an injunction issued on April 28, 1958 by the Honorable Louis E. Goodman, Judge of the District Court for the Northern District of California at San Francisco, enjoining the defendant, Weyerhaeuser Steamship Co., a corporation, from prosecuting any Third Party Complaint or proceeding against the United States in the instant cause in this Court. Further, your affiant has been advised by Government Admiralty counsel in San Francisco who obtained the restraining order that counsel for defendant Weyerhaeuser Steamship Co., a corporation, in San Francsco, did not contest issuance of said injunction and that defendant Weyerhaeuser is

now enjoined from proceeding with any action against the United States of America in this District by way of third party complaint in the above entitled cause. Said restraining order and injunction are hereby incorporated by reference as though fully set forth and true copies thereof are annexed hereto and made a part of this affidavit, certified copies thereof having been previously filed with this Court.

JACOB A. MIKKELBORG.

Subscribed and Sworn To before me this 7th day of May, 1958.

[Seal]

/s/ J. THORNBERG,
Deputy Clerk,
United States District Court
Western District of Washington
Northern Division.

LLOYD M. BURKE,
United States Attorney.
KEITH R. FERGUSON,
Special Assistant to the Attorney General.
GRAYDON S. STARING,
Attorney, Admiralty and Shipping Section
Department of Justice.
JOHN F. MEADOWS,
Attorney, Admiralty and Shipping Section
Department of Justice,
447-A Post Office Building,
San Francisco 1, California.
Telephone: MArket 12500.
Proctors for United States of America.

In the United States District Court for the Northern District of California, Southern Division

In Admiralty

No. 27359

WEYERHAEUSER STEAMSHIP COMPANY, a corporation,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Cross-Libelant,

vs.

The American Steamship F. E. WEYERHAEUSER, etc., and WEYERHAEUSER STEAMSHIP COMPANY, a corporation,

Cross-Respondent.

ST. PAUL FIRE & MARINE INSURANCE CO., a corporation, and FIREMAN'S FUND INSURANCE CO., a corporation,

Intervening Libelants.

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

Whereas in this cause it has been made to appear by the verified Ancillary Petition for Injunction and Temporary Restraining Order filed herein which was on this 22nd day of April, 1958 presented to the Honorable Louis E. Goodman, Judge of the United States

District Court for the Northern District of California, that a restraining order preliminary to hearing upon the issuance of preliminary injunction should issue, without notice because immediate and irreparable injury, loss or damage will result to the respondent before notice can be served and a hearing had thereon, in that libelant may in the meantime file and serve a third-party complaint upon respondent in that certain action entitled Ostrom vs. Weyerhaeuser Steamship Co., Civil No. 4255 in the United States District Court for the Western District of Washington and make such motions and secure such orders therein as to render ineffective the injunction prayed for herein by making it necessary for respondent herein, in order to protect its interests adequately, to appear and defend the said third-party complaint notwithstanding the exclusive jurisdiction of this Court, and whereas notice and a hearing before entering a temporary restraining order in the present circumstances should not be required inasmuch as the material facts are supported by the record herein, now therefore

It Is Ordered that libelant, its agents, successors, deputies, servants and employees and all persons acting by, come through or under them or any of them or by or through their order, be, and they are hereby, restrained until Monday, April 28, 1958, from filing, instituting, or prosecuting any third-party complaint, action or proceeding whatever against respondent United States of America in that certain action entitled Ostrom vs. Weyerhaeuser Steamship Co., Civil No. 4255, in the United States District Court for the Western District of Washington, and it is

Further Ordered that libelant by its proctors herein be and appear before this Court in the Master Calendar Department thereof Monday, April 28, 1958, then and there to show cause, if any there be, why a preliminary injunction should not be issued further restraining libelants as aforesaid pending the disposition of the present action herein, and it is

Further Ordered that service of this order be made upon libelant by serving the order upon libelant's proctors of record herein or any of them.

Issued at 4 o'clock P.M. this 22nd day of April, 1958.

/s/ LOUIS E. GOODMAN,
United States District Judge.

United States District Court Western District of Washington Northern Division

Civil No. 4255

REYNOLD E. OSTROM,

Plaintiff,

v.

WEYERHAEUSER STEAMSHIP CO., a corporation,

Defendant.

NOTICE OF INJUNCTION AGAINST FILING OR PROSECUTION OF THIRD-PARTY COMPLAINT.

To: Clerk of the Above-Entitled Court.

To: Reynold E. Ostrom, plaintiff, and Levinson & Friedman, his attorneys, and

To: Weyerhaeuser Steamship Co., defendant, and Bogle, Bogle & Gates, its attorneys.

You, and Each of You, Will Please Take Notice of the injunction, a certified copy of which is attached hereto, enjoining defendant Weyerhaeuser Steamship Co., from filing or prosecuting any third-party complaint or action against United States of America herein.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ JACOB A. MIKKELBORG,
Assistant United States Attorney.

/s/ KEITH R. FURGUSON,
Special Assistant to the
Attorney General.

LLOYD H. BURKE,
United States Attorney.

KEITH R. FERGUSON,
Special Assistant to the Attorney General.

GRAYDON S. STARING,
Attorney, Admiralty and Shipping Section
Department of Justice.

JOHN F. MEADOWS
Attorney, Admiralty and Shipping Section,
Department of Justice,
447-A Post Office Building,
San Francisco 1, California.
Telephone: MArket 1-2500.

Proctors for United States of America.

In the United States District Court for the Northern District of California, Southern Division

In Admiralty

No. 27359

WEYERHAEUSER STEAMSHIP COMPANY, a corporation,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Cross-Libelant,

vs.

The American Steamship F. E. WEYERHAEUSER, etc., and WEYERHAEUSER STEAMSHIP COMPANY, a corporation,

Cross-Respondent.

ST. PAUL FIRE & MARINE INSURANCE CO., a corporation, and FIREMAN'S FUND INSURANCE CO., a corporation,

Intervening Libelants.

WRIT OF INJUNCTION

The President of the United States of America, to Weyerhaeuser Steamship Company, a corporation of the State of Delaware having an office and place of business at San Francisco, California, and its agents, suc-

cessors, deputies, servants, employees, attorneys, proctors, and all persons acting by, through, or under them or any of them and to each and every one of you, Greeting

Whereas, respondent United States of America has heretofore filed an Ancillary Petition for Injunction and Temporary Restraining Order herein in the United District Court for the Northern District of California against you and each of you for certain relief as therein set forth and has obtained an order and allowance of a permanent injunction as prayed for in the said Ancillary Petition;

Now, Therefore, we having regard to the matters in the said Ancillary Petition contained, do hereby command and strictly enjoin you, the said Weyerhaeuser Steamship Company, your agents, successors, deputies, servants, employees, attorneys, proctors, and all persons acting by, through, or under them or any of them and each of you to refrain and desist wholly from filing, instituting, or prosecuting any third-party complaint, actions, or proceeding whatever against respondent United States of America in that certain action entitled Ostrom v. Weyerhaeuser Steamship Co., Civil No. 4255 in the United States District Court for the Western District of Washington, which commands and injunctions you are respectively required to observe and obey;

And hereof fail not under penalty of law thence ensuing.

Witness, the Honorable Louis E. Goodman, Judge of said Court, at the City and County of San Francisco, in

the Northern District of California, this 28th day of April, 1958.

C. W. CALBREATH,
Clerk.
/s/ By J. P. WELSH,
Deputy Clerk.

A True Copy, Attest
C. W. CALBREATH, Clerk.
By /s/ J. P. WELSH Deputy Clerk.
[Seal]

United States District Court
Western District of Washington
Northern Division
Civil No. 4255

REYNOLD E. OSTROM,

Plaintiff,

v.

WEYERHAEUSER STEAMSHIP CO., a corporation,

Defendant.

WEYERHAEUSER STEAMSHIP CO., a corporation,

Third Party Plaintiff,

v.

UNITED STATES OF AMERICA,

Third Party Defendant.

AFFIDAVIT OF RAYMOND G. SANDWICK

Raymond G. Sandwick, being first duly sworn upon his oath, deposes and says:

That he is the Chief of the Plant Branch of the Portland District of the United States Army Engineers and in that capacity is familiar with the status, location, and operations of the United States Army Dredge Pacific.

That the United States Army Dredge Pacific is owned and operated by the United States as a public vessel, is not registered, enrolled or certificated as a merchant vessel and does not operate for hire, profit, or otherwise as a merchant vessel.

That the United States Army Dredge Pacific is presently in dry dock at Swan Island, Portland, in the State of Oregon for major repairs and overhaul, the estimated date of completion of which is about May 24, 1958.

/s/ RAYMOND G. SANDWICK.

County of Multnomah State of Oregon—ss.

Subscribed and sworn to before me this 8 day of April, 1958.

[Seal]

/s/ CLIFFORD C. COMISKY,

My Commission expires Nov. 8, 1960.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest: JOHN A. BURNS

Clerk, U. S. District Court Western District of Washington.

/s/ By J. THORNBURGH,
Deputy Clerk.

[Endorsed]: Filed May 7, 1958.

United States District Court
Western District of Washington
Northern Division

Civil No. 4255.

REYNOLD E. OSTROM,

Plaintiff,

vs.

WEYERHAEUSER STEAMSHIP CO., a corporation,

Defendant.

MOTION FOR SPECIAL SETTING

Comes Now defendant Weyerhaeuser Steamship Co., a corporation, and moves the Court for an immediate trial setting of the above entitled case.

This motion is based upon the records and files of said cause and the attached affidavit of Edward S. Franklin of the attorneys for defendant Weyerhaeuser Steamship Co., a corporation.

/s/ BOGLE, BOGLE & GATES,
Attorneys for Defendant.

United States of America, State of Washington, County of King—ss.

Edward S. Franklin, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for defendant Weyerhaeuser Steamship Co., a corporation, and makes this affidavit in support of defendant's motion for an immediate setting for trial of the above-entitled action;

This action was filed in the Superior Court of King County, Washington, under the Jones Act on October 11, 1956, and was thereupon removed to the United States District Court by petition filed October 30, 1956; that defendant served and filed its answer herein on November 13, 1956, and said cause has been continuously at issue since said time;

That thereafter defendant sought to implead the United States of America as a third party defendant which motion was denied by this Court on November 20, 1957; that defendant thereafter moved the Court for reconsideration of its order on defendant's motion for joining the United States of America as an additional party defendant which culminated in the United States of America obtaining and entering in the United States District Court at San Francisco, California, an order restraining defendant from proceeding to implead the United States of America in this action, and the United States of America is not a proper party to the trial of this case;

That this case was originally set for trial on February 25, 1958, and was thereafter continued to May 20, 1958, and was then stricken from the trial calendar by order of this Court on May 15, 1958;

That on August 18, 1958, at the monthly assignment calendar of this Court, defendant moved for an immediate trial setting of this case but the action was not assigned for trial;

That the interest of justice requires this case be adjudicated within the immediate future and the liability, if any, of Weyerhaeuser Steamship Co., a corporation,

defendant herein, be determined for the reason that the principal action involving the United States of America and Weyerhaeuser Steamship Co. involving the collision of the Dredge PACIFIC and the S. S. F. E.WEYERHAEUSER will be tried in San Francisco, California, in November, 1958.

/s/ EDW. S. FRANKLIN.

Subscribed and Sworn To before me this 3rd day of September, 1958.

/s/ RONALD E. McKRISTEY,
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed Sept. 3, 1958.

[Title of District Court and Cause.]

ORDER STAYING SETTING OF CASE

This matter coming on to be heard by agreement of the parties, at 1:30 P. M. September 11, 1958 on the motion of defendant, Weyerhaeuser Steamship Company for an immediate setting of the above case for trial; and the plaintiff being represented by his attorneys, Levinson & Friedman, Mr. Sam L. Levinson appearing in the matter, and the defendant being represented by its attorneys, Bogle, Bogle & Gates, Mr. Edw. S. Franklin appearing in the matter; thereupon the Court, on its own motion, requested the office of the United States District Attorney to be represented at said hearing, although not a party to this litigation, and Mr.

Jacob A. Mikkelborg, Assistant United States District Attorney, apppeared in response to such request; and

It Appearing to the Court that the above entitled action is a personal injury action arising from a collision occurring off Coos Bay, Oregon, on September 8, 1955 between the United States Dredge PACIFIC and the Steamship F. E. WEYERHAEUSER, owned and operated by defendant, wherein plaintiff, a crew member of the United States Dredge PACIFIC, alleges his injuries were due to the negligent navigation of the steamship F. E. WEYERHAEUSER, which [illegible] denied and affirmatively asserted that the collision was solely due to the negligence of the United States in the navigation of the Dredge PACIFIC; and

It Further Appearing to the Court that an admiralty action is presently pending in the United States District Court in San Francisco, California between the United States of America and Weyerhaeuser Steamship Company arising from said collision, in which the legal liabilities of the parties for said collision will be finally determined; and

It Further Appearing to the Court that a trial and judgment of the above entitled action prior to the trial of the collision action in San Francisco would not be in the interest of orderly litigation; Now Therefore, it is hereby

Ordered that the setting of the above entitled case for trial be stayed pending the trial and entry of judgment in the pending collision action in the United States District Court in San Francisco, California, in

the pending action in which the United States of America, and Weyerhaeuser Steamship Company are parties thereto; to which order defendant excepts and its exception is hereby allowed.

Done In Open Court this 29th day of September, 1958

/s/ JOHN C. BOWEN,
United States District Judge.

Approved:
/s/ SAM L. LEVINSON,
Attorneys for Plaintiff.

Presented by:
/s/ EDW. S. FRANKLIN,
of Bogle, Bogle & Gates,
Attorneys for Defendant.

[Endorsed]: Filed Sept. 29, 1958.

[Endorsed]: No. 17187. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Weyerhaeuser Steamship Company and St. Paul Fire & Marine Insurance Co. and Fireman's Fund Insurance Co., Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed and Docketed: December 6, 1960.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 17187.

UNITED STATES OF AMERICA,

Appellant,

vs.

WEYERHAEUSER STEAMSHIP COMPANY, a corporation, ST. PAUL FIRE & MARINE INSURANCE CO., a corporation, FIREMAN'S FUND INSURANCE CO., a corporation, and BOSTON INSURANCE COMPANY, a corporation,

Appellees.

CONCISE STATEMENT OF THE POINTS ON WHICH APPELLANT UNITED STATES OF AMERICA INTENDS TO RELY [Rule 17(6)] AND DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

Comes now Appellant, United States of America, and hereby and herewith incorporates as its concise statement of the points on which Appellant United States of America intends to rely [Rule 17(6)] and designation of parts of the record material to the consideration of the appeal and to be printed the contents of the Designation of Record on Appeal and Statement of Points to be Relied Upon on Appeal heretofore filed by Appellant in the United States District Court for the Northern District of California, Southern Division and

transmitted by the Clerk of said Court to the Clerk of the United States of Appeals for the Ninth Circuit, with the additional designation in the record of this statement as material to the consideration of the appeal and for printing.

GEORGE COCHRAN DOUB,
Asssitant Attorney General.

LAURENCE E. DAYTON,
United States Attorney.

MORTON HOLLANDER,

JOHN G. LAUGHLIN,

W. HAROLD BIGHAM,

LEAVENWORTH COLBY,

KEITH R. FERGUSON,

Attorneys, Department of Justice.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Dec. 16, 1960. Frank H. Schmid, Clerk.

[Title of Court of Appeals and Cause.]

CONCISE STATEMENT OF THE POINTS ON WHICH APPELLEE WEYERHAEUSE STEAMSHIP COMPANY INTENDS TO RELY [Rule 17(6)] AND DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

Comes now Appellee, Weyerhaeuser Steamship Company, and hereby and herewith incorporates as its concise statement of the points on which Appellee Weyerhaeuser Steamship Company intends to rely [Rule 17(6)] and designation of parts of the record material to the consideration of the appeal and to be printed the contents of the Counter Designation of Record on Appeal submitted by Weyerhaeuser Steamship Company heretofore filed by Appellee in the United States District Court for the Northern District of California, Southern Division and transmitted by the Clerk of said Court to the Clerk of the United States Court of Appeals for the Ninth Circuit, with the additional designation in the record of this statement as material to the consideration of the appeal and for printing.

/s/ GRAHAM JAMES & ROLPH,

/s/ By HENRY R. ROLPH,

Proctors for Appellee, Weyerhaeuser Steamship Company.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Dec. 23, 1960. Frank H. Schmid, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated by and between the parties hereto that Exhibit A of "Respondent and Cross-Libelant's Suggestion of Error in the Opinion of this Court [U. S. Dist. Court] in its Application of Radar Location as 'Visible' and 'Ascertainment' Within the Meaning of Rules 18 and 16 of the International Rules of the Road", because of its voluminous nature and in order to economize in the cost of the printed record, may be omitted from the printed record on appeal and considered by the Court in its original form and that three copies of Exhibit A shall be presented forthwith by Appellant to the Court.

GRAHAM JAMES & ROLPH,
/s/ By HENRY R. ROLPH,
Proctors for Appellee,
Weyerhaeuser Steamship Company
WILLIAM H. ORRICK, JR.
Assistant Attorney General.
LAURENCE E. DAYTON,
United States Attorney.
MORTON HOLLANDER,
JOHN G. LAUGHLIN,
W. HAROLD BIGHAM,
LEAVENWORTH COLBY,
/s/ By KEITH R. FERGUSON,
Attorneys, Department of Justice.

So Ordered This 23rd day of February, 1961.

RICHARD H. CHAMBERS,
United States Circuit Judge.

[Endorsed]: Filed Feb. 27, 1961. Frank H. Schmid, Clerk.

[fol. 148]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Minute entry of argument and submission—August 1, 1961 (omitted in printing).

[fol. 149]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Chambers, Barnes and Hamley, Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—August 30, 1961

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[fol. 150]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17,187

UNITED STATES OF AMERICA, Appellant,

vs.

WEYERHAEUSER STEAMSHIP COMPANY, Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

OPINION—August 30, 1961

Before: Chambers, Barnes and Hamley, Circuit Judges.

BARNES, Circuit Judge:

This case arises in admiralty upon a libel against the United States, and a cross-libel filed by the United States. The district court thus had jurisdiction under 28 U.S.C. §§ 1345 and 1346, and 46 U.S.C. § 782. A final decree was entered below, and this court has jurisdiction under 28 U.S.C. § 1291.

On September 8, 1955, appellee's vessel, the S.S. F. E. WEYERHAEUSER, collided with appellant's vessel, the United States Army dredge PACIFIC, off the coast of Oregon. The trial court found that both parties were at fault and this finding is not challenged here. The accident caused significant damage to both vessels, and resulted in personal injury. Reynold Ostrom, an employee of the United States serving on the PACIFIC, recovered compensation from the United States in the amount of $329.01 under the Federal Employees' Compensation Act (5 U.S.C. §§ 751, *et seq.*). Ostrom also recovered $16,000 from appellee by settlement. St. Paul Fire & Marine Insurance Company intervened claiming $19,122.75 as damages under its [fol. 151] policy of marine insurance for its cargo general average contribution arising out of the collision, and Fireman's Fund Insurance Company likewise intervened, claiming $923.85 for its marine insurance cargo general average contribution. The court found (Finding II, Tr. 72) the intervenors had made such general average payments, and also found in favor of intervenor Boston Insurance Company in the sum of $443.54, on the same basis, or a total general average recovery of $20,490.14.

In accordance with its finding of mutual fault the trial court divided the damages between the parties as required by maritime law. It found that each party suffered damages as follows:

Weyerhaeuser Steamship Company:

$27,652.13	physical and detention damages of the S.S. F. E. WEYERHAEUSER
16,000.00	paid to Ostrom in settlement of suit against it.
$43,652.13	Total provable damages.

United States of America:

$16,949.12	physical and detention damages of the PACIFIC
20,490.14	payable to intervening libelants (insurance)
$37,439.26	Total provable damages

(Findings of Fact IV, R. p. 74.) Since appellee's provable damages exceeded appellant's damages by $6,212.87, the court awarded appellee judgment in the sum of $3,106.44, plus interest. Appellant, claiming that the court erred in including the $16,000 personal injury award in appellee's provable costs, has taken this appeal.

Appellant does not deny the antiquity or propriety of the maritime rule requiring the apportionment of damages in cases of mutual fault. Appellant also does not deny that in most instances the apportionment rule applies to damages occasioned by personal injuries. Appellant does contend, however, that the apportionment rule does not apply to damages arising from an injury to any employee covered by the Federal Employees' Compensation Act. Under 5 U.S.C. § 757(b), the liability of the United States, under the Act, with respect to the injury or death of an employee [fol. 152] is "exclusive and in place of all other liability of the United States . . . to the employee . . .. and anyone otherwise entitled to recover damages from the United States . . . on account of such injury or death . . .." This statute on its face, then, does seem to save the United States harmless from any liability from injury to its employees other than that specified by the statute. The government points out that statutes such as these are "give and take" arrangements. The employer loses his defenses to the employee's action and the employee gets a remedy which is fast and certain. The employer, on the other hand, enjoys a liability which is limited and determinative. To permit recoveries beyond that specifically allowed by the Act would be subversive of the statutory scheme. This is so, appellant contends, even with respect to recoveries by third parties—what cannot be accomplished directly

should not be permitted by the indirect means of a third party recovery.

That the Federal Employees' Compensation Act provides the sole remedy for injured employees of the United States is well established. That was the only question before the Supreme Court in *Patterson* v. *United States*, 1959, 359 U.S. 495. And it affirmed *Johansen* v. *United States*, 1952, 343 U.S. 427, 441, which states: The United States "has established by the Compensation Act a method of redress for its employees. There is no reason to have two systems of redress." (343 U.S. at 439.)[1]

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[1] And see: *Lewis* v. *United States*, D.C. Cir. 1951, 190 F.2d 22; *Sasse* v. *United States*, 7 Cir. 1953, 201 F.2d 871; *Smithers & Company Inc.* v. *Coles*, D.C.Cir. 1957, 242 F.2d 220, *cert. denied* 354 U.S. 914; *Underwood* v. *United States*, 10 Cir. 1953, 207 F.2d 862.

Earlier this year, when this court considered the exclusiveness of an injured person's remedy under the Federal Employees' Compensation Act (46 U.S.C. § 751, *et seq.*) vis-a-vis the Federal Tort Claim Act (28 U.S.C. § 1346(b)), this court said:

> "The language of §§ 751(a) and 757(b) of the Federal Employees' Compensation Act . . . is plain and unambiguous. Under the statute the employee, regardless of any negligence, is to receive in case of injury certain definite amounts, which recovery 'shall be exclusive, and in place, of all other liability of the United States.' His recovery is not dependent upon the injury being caused by the negligence of any employees of the United States nor is it reduced or taken from him if the injury is the result of his own negligence. That the remedy provided by the Federal Employees' Compensation Act is to be exclusive is shown by the legislative history of Congress at the time that the statute was amended in 1949. The House Committee Report contains the following:
>
> > 'It is the committee's purpose to have the language of such Section 7 entirely clear in this respect so as to express the intention that the compensation remedy shall henceforth be the exclusive remedy of a person protected by this act against the United States, or against its instrumentalities in cases in which a suable instrumentality is the employer.'
>
> Similarly, the Senate Report states:
>
> > 'The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any

[fol. 153] In furtherance of this policy it has been held that a joint tortfeasor may not seek contribution or indemnity from the United States when the joint tortfeasor is sued by the administrator of a deceased United States employee (*Christie* v. *Powder Power Tool Corp.*, D.D.C. 1954, 124 F.Supp. 693). Appellee contends, however, that this case cannot control here, for it does not deal with the admiralty rule requiring apportionment of damages. Appellee points out that the trial court did not award it any sum as compensation for the injury suffered by Ostrom. Rather the award reflects the damage which appellee suffered as a result of the collision when it was required to compensate Ostrom for his injuries. In other words, appellee sought and received recovery in its own right for appellant's breach of duty to it under the maritime law; appellee claims that its right is not derivative from any right which Ostrom may have had.

The question presented here is a difficult one. Its resolution will abridge either the statutory policy or the maritime law. To allow a third party recovery against the United States on any ground *is* subversive of the statute limiting the liability of the United States. On the other hand, the money paid to Ostrom *is* an element of the total damages [fol. 154] suffered by appellee. And failure to apportion such damages is a breach of the maritime rule—for the rule requires the apportionment of all damages suffered, without regard to the fact that some of those damages stem from liabilities which could not be imposed against one of the parties but for the apportionment. (*The Chattahoochee*, 1899, 173 U.S. 540.) There appear to be no cases which can be described as controlling, but there are some precedents which may be helpful.

With the first portion of our last statement appellee would not agree. It refers us to *United States* v. *The S. S.*

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proceeding under any other workmen's compensation law or under any Federal tort liability statute.'

It thus appears that neither the plain language of the statute, its legislative history, nor the prior construction of similar statutes permits a recovery by appellant." (*Posegate* v. *United States*, 1961, 288 F.2d 11 at 14.)

Washington, E.D.Va. 1959, 172 F.Supp. 905, and *Texas Co.* v. *United States*, 4 Cir., 1959, affirmed without opinion 272 F.2d 711 (no petition for writ of certiorari filed).

It is true that Judge Bryan in the *Washington-Ruchamkin* case, *supra*, did grant Texas Company, the private shipowner, judgment against the United States (for one-half of the awards made against the Texas Company in favor of the heirs of four soldiers killed aboard the government vessel in the collision)—and also ordered such judgment without deduction for the veterans benefits already paid by the government to the soldiers' heirs. We point out two things. First: the *Washington-Ruchamkin* case was, unlike this present action, brought under the Death on the High Seas Act, 46 U.S.C. § 761. This action was brought under 46 U.S.C. §§ 781-790, the Public Vessels Act. Yet both Acts must be construed together in laying down the pattern and marking the restrictions under which the United States may be sued. *Mejia* v. *United States*, 5 Cir. 1945, 152 F.2d 686, *cert. denied* 328 U.S. 862; *United States* v. *Caffey*, 2 Cir. 1944, 141 F.2d 69. Secondly: (and of greater importance) Judge Bryan listed four issues before him, after the fourth circuit had held "The Texas Company also at fault." The first three do not concern us here; the fourth assumes as *admitted* the very legal question here in issue.[2] We do not know why this admission was made by the gov- [fol. 155] ernment in the *Washington* case. But no such admission was made in the instant case. And, of course, the government is not estopped from taking a position here contrary to that it has invariably or occasionally taken previously. *Utah Power & Light* v. *United States*, 1917, 243 U.S. 389, 409; *United States* v. *City and County of San Francisco*, 1941, 310 U.S. 16, 32.

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[2] The opinion raises as the fourth question before the court:

"(d) whether against *the admitted* right of The Texas Company to reimbursement from the government for one-half of the death awards as collision damages, the United States may offset the sums paid and payable by the government to the decedents' dependents as statutory death gratuities, indemnity, and compensation." (Emphasis added.) 172 F.Supp. 905 at 907.

Appellee concludes its references to the *Washington* case in its brief with the following appeal to the court's conscience:

> "The fact is that the United States with knowledge of the admiralty mutual fault collision rule enacted a scheme of compensation for its employees injured in the performance of duty without reference to negligence. Insofar as Weyerhaeuser is concerned the employee's compensation has nothing to do with this collision and should have no bearing on Weyerhaeuser's right to have all the damages resulting from the collision mutually apportioned between the two vessels. Any other result would be grossly unfair."

Whether fair or unfair, the Supreme Court has established the rule that the United States cannot be burdened *directly* with tort liability for injuries sustained by its employees. We do not presume that if there had never been a retreat by the United States from its absolute nonliability as a sovereign, appellee could or would here maintain that such claim of sovereignty was inferior to the right established by admiralty law, no matter how ancient, simply because unfair to the shipowner. Any claim of sovereign immunity is to some extent always unfair to the one who has sustained loss or damage.

But can a limited waiver of sovereign immunity be enlarged by indirection, *i.e.*, through the negligent act of a third party—the shipowner? We think not.

There has been no question for one hundred years as to the general maritime rule that a total loss in collision cases is divided where both vessels are at fault. *The Catherine*, 1954, 58 U.S. 171, 177; *Halcyon Lines* v. *Haenn Ship Ceiling & Refit ng Corp.*, 1952, 342 U.S. 282. And appellee cites to us as examples where damages *have been allowed* against the government two cases: *The City of Rome*, 2 Cir. 1930, 38 F.2d 782, 786; *Chicago-Silverpalm*, 9 Cir. 1937, 94 F.2d 771.

[fol. 156] *The City of Rome* concerned itself only with an attempt to exempt or limit liability by Ocean Steamship Company (as the owner of The City of Rome) from the

claims of Goldye M. Dobson, as Administratrix, against it; and its claim for damages against The United States for property damages. Judge Learned Hand specifically avoided any "question of marshalling the proceeds of the Rome as between the United States and the private claimants."

Further, this case was decided in 1930. Title 5 U.S.C. § 757(b) (the exclusive liability subsection) was created by the Act of October 14, 1949, Sec. 303(g). It was given but a limited retroactive effect. (See U.S.Code, 1952 Ed., Title 1-14, p. 371.)

Chicago-Silverpalm, supra, is cited to us as 94 F.2d 771. *The Silver Palm* appears in 94 F.2d 754, and holds the United States at mutual fault with the private shipowner for a collision. It does not touch upon the matter here involved. *The Silver Palm (Silver Line* v. *United States),* 9 Cir. 1937, 94 F.2d 776, has solely to do with limitation of liability on the Silver Palm's part. In *The Silver Palm (Silver Line* v. *United States),* 9 Cir. 1937, 94 F.2d 781, the appeal was from an order permitting the administrators of three deceased naval officers to proceed with their wrongful death suits. The appeal was dismissed as moot. Neither *The Silver Palm* cases, nor *The Rome* case, establish the principle claimed by appellee that "similar damages have been uniformly allowed in previous cases against the government." (Appellee's Brief, p. 10.) Nor do alleged voluntary settlements by the government establish a right specifically excluded and prohibited by an Act of Congress, as is argued in appellant's brief. However, there is authority to support the appellee's position. In *The Tampico case* (W.D.N.Y. 1942, 45 F.Supp. 174), a stevedore was injured while transferring cargo from a barge to The Tampico. The stevedore, who was employed by The Tampico's owner, sued the barge owner claiming that the barge was defective. The barge owner impleaded the owner of The Tampico, claiming that it was negligent in operating a "clamshell bucket" used in transferring cargo. The Tampico's owner was immune from personal injury suits by its employees, for it was covered by the Longshoremen's and Harbor Workers' Compensation Act, 38 U.S.C. §§ 901,

et seq. The "exclusiveness of liability" under this Act, 33 [fol. 157] U.S.C. § 905, is similar in extent to 5 U.S.C. § 757(c). Nevertheless, the trial court held that the barge owner could obtain contribution from the owner of The Tampico. The Tampico's owner was immune from suits brought by the stevedore or anyone in his right, but "the right in admiralty to contribution between wrongdoers does not stand on subrogation but arises directly from the tort." We must note, of course, that this is a district court case, not binding on this court, and of limited precedential value.

The Tampico was cited and quoted with approval by a higher court in *Hitaffer* v. *Argonne Co.*, D.C.Cir. 1950, 183 F.2d 811, *cert. denied* 340 U.S. 852. In that case appellant's husband was injured during the course of his employment; his employer, as in *The Tampico*, was covered by the Longshoremen's and Harbor Workers' Compensation Act. The wife claimed that the injury to her husband had interfered with her marital relationship and she sued for loss of consortium. The court held that the action for loss of consortium does not stand on subrogation but arises directly from the tort. Thus the wife was not suing in her husband's right; she was suing in her own right and was entitled to damages for her loss. Accordingly, the court held that the wife's right to damages for loss of consortium was not barred by the Compensation Act. This case, however, was expressly overruled in 1957 in *Smithers & Company Inc.* v. *Coles*, D.C.Cir., 242 F.2d 220, *cert. denied* 354 U.S. 914, a case heard by the District of Columbia Circuit en banc. The court noted that the right to damages for loss of consortium must be regarded as a right "flowing from" the spouse's injury:

> "Whether the right of a spouse be regarded as independent, i.e., arising directly from the tort, or as derivative, that right does not come into existence except for the occurrence of the injury. Absent a compensable injury to the one spouse there would be no claim to assert against the employer." (242 F.2d at 224-225.)

Expressing its disagreement with *Hitaffer*, the court in *Smithers & Company Inc.* v. *Coles* held that all liability

"flowing from" the employee's injury is governed by the Act:

> "In the Hitaffer opinion this court conceded that the 'plain and literal language' of this statute *could* be construed to bar 'any right of action flowing from the [fol. 158] compensable injury,' but rejected that interpretation. We think the statute cannot be read any other way without doing extreme violence to those 'plain and literal' words read in the light of the purposes of the Act." (242 F.2d at 224.)

The same result had already been reached by the tenth circuit with respect to the Federal Employees' Compensation Act, the statute which is in issue here (*Underwood* v. *United States*, 10 Cir. 1953, 207 F.2d 862).[3] The *Underwood* case received the approbation of this court in *Thol* v. *United States*, 9 Cir. 1954, 218 F.2d 12, 14. The *Smithers & Company Inc.* v. *Coles* and *Underwood* cases are, we think, persuasive authority here.[4] In our opinion the shipowner's right of action is just as dependent upon the employee's injury as the wife's claim for loss of consortium; or to put it more precisely, the shipowner's claim is no more independent of the employee's injury than is the wife's. If, then, the policy of the statute bars the wife's action for loss of consortium, it should also bar the shipowner's action for contribution.

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[3] We agree with the reasoning of the tenth circuit. There the court said:

> "It is significant, we think, that the Congress chose to speak in terms of liability of the government, not in terms of remedies or rights of action, and in doing so, it gave a right of action only to the extent that it saw fit to relax governmental immunity from any liability." *Underwood* v. *United States*, 10 Cir., 1953, 207 F.2d 862, 864.

[4] As the District of Columbia Circuit pointed out in *Smithers*:

> "[E]very court which had undertaken to construe the same or similar exclusionary clauses prior to the Hitaffer case had arrived at a result in conflict with the decision of this court in Hitaffer. [cases noted] Cases decided subsequent to the Hitaffer case also followed the literal language of statutes cast in substantially the same terms." 242 F.2d 220 at 225.

The authority supporting appellee's position is not so persuasive as the cases last cited above. While *The Tampico* supports appellee's cause, it was, in the eyes of one court overruled by *American Mut. Liability Ins. Co.* v. *Matthews*, 2 Cir. 1950, 182 F.2d 322. (See *Coates* v. *Potomac Elec. Power Co.*, D.D.C. 1951, 95 F.Supp. 779.) For this reason, appellee did not cite *The Tampico*. We cannot agree that the *Matthews* case overrules *The Tampico*. *Matthews* held only that the Longshoremen's and [fol. 159] Harbor Workers' Compensation Act prevents the joint tortfeasor from obtaining contribution from the employer covered by the Act. This parallels the holding, under the Federal Employees' Compensation Act, in *Christie* v. *Powder Power Tool Corp., supra.* It does not deal with the problem presented by the admiralty rule and the point raised by *The Tampico*, viz. that the suit based upon the admiralty rule is an independent cause of action not founded upon the injured employee's right but founded upon the employer's breach of a duty *to other shipowners* to exercise care in navigation. This point *is* involved, however, in the persuasive authority discussed above relating to a spouse's right to sue for loss of consortium. Thus, while it does not appear that *The Tampico* has been overruled, it has been robbed of its persuasiveness by subsequent developments.

Appellee places its principal reliance upon a series of cases interpreting the Harter Act, the most emphasis being placed on *The Chattahoochee, supra.* There a steamer and a schooner collided, both vessels being at fault. The owners of the schooner were awarded damages as bailees of the cargo, but the steamer was allowed to recoup half of the value of the cargo—even though the schooner was not liable to the cargo owners (under Section 3 of the Harter Act, 46 U.S.C. § 192). The shipowner's statutory exemption from liability did not preclude a recovery against it under the maritime rule. Thus, appellee claims, the statutory limitation upon the employer's liability to his employee should not destroy his liability under the maritime rule.

We concede that *The Chattahoochee* is strong authority in favor of appellee's position. There is, of course, the obvious distinction in the fact that *The Chattahoochee* interprets the Harter Act while we are here called upon to interpret the Federal Employees' Compensation Act. But a mere comparison of statutory phraseology will not aid in resolving the problem. The Harter Act provides categorically that the shipowner shall not be liable for losses due to faults of navigation. While this command may not be so specific as that contained in the Compensation Acts, it is as clear and strong. But the language of the Harter Act must be considered in the light of the judicial gloss which has been placed upon it. In *American Mut. Liability Ins. Co.* v. *Matthews*, *supra*, we learn (182 F.2d at 324) that "The Harter Act was not intended to affect the lia- [fol. 160] bility of one vessel to the other in a collision case . . ." Can the same be said with respect to the Compensation Acts? We have already seen that such Acts cut off the spouse's right to damages for loss of consortium. And there is no sound reason why a distinction should be made between such cases and the case of a shipowner seeking contribution under the admiralty rule. The Acts, in establishing the duty of the employer and in making that duty exclusive, have abolished the independent rights of third parties against the employer for the damage which the employer causes them when he wrongfully injures his employee. Thus it must be candidly admitted that while the United States once had a duty *to other shipowners* to navigate carefully in order not to injure its own employees, that duty has been abrogated by the Compensation Act. We hold *The Chattahoochee* is not here controlling because it deals with a different statute which has encrusted upon it a significantly different judicial history.

The policy of an Act which precludes a wife's recovery for loss of consortium also precludes a shipowner's claim for contribution from a joint tortfeasor. The judgment below is *reversed* with directions to recompute damages without any allowance for the $16,000 paid by appellee to the injured United States employee, Ostrom.

The government raised a second issue regarding the trial court's interpretation of the rules of the sea in connection

with the use of radar. Since both parties admitted the propriety of the trial court's finding of mutual fault, this issue does not bear upon the correctness of the judgment. Appellant briefed the issue only very sketchily and appellee has not briefed the issue at all. In the absence of an actual controversy with adequate briefing by both sides, this court should not be called upon to render a decision on the issue. It appears that the appellant is requesting an advisory opinion, and, of course, federal courts generally refrain from rendering such opinions. (*Muskrat* v. *United States*, 1911, 219 U.S. 346.) We so refrain here.

Reversed with instructions.

[File endorsement omitted].

[fol. 161]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17187

UNITED STATES OF AMERICA, Appellant,

WEYERHAEUSER STEAMSHIP COMPANY, Appellee.

JUDGMENT—Filed and entered August 30, 1961

Appeal from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded to the said District Court with directions to recompute damages without

any allowance for the $16,000 paid by appellee to the injured United States employee, Ostrom.

Filed and entered August 30, 1961.

[fol. 162]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Chambers, Barnes and Hamley, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING—October 24, 1961

On consideration thereof and by direction of the court, It Is Ordered that the petition of appellant filed September 29, 1961 and within the time allowed therefor by rule of court for a rehearing of above cause be and hereby is, denied.

[fol. 163] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 164]

SUPREME COURT OF THE UNITED STATES

No. 674—October Term, 1961

WEYERHAEUSER STEAMSHIP COMPANY, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—March 5, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.